IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 18 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TV BINGO NETWORK, INC., MBMC ACQUISITION CORP., GORDON GRAVES, LARRY MONTGOMERY, TV GAMES, INC., and MULTIMEDIA CREATIVE SERVICES, INC.

Plaintiffs,

v.

STATE OF OKLAHOMA *ex rel.* DAVID MOSS, and DAVID MOSS in his capacity as District Attorney of Tulsa County, District 14, Oklahoma,

Defendants.

Case No. 94-C-671-BU H

ENTERED ON DOCKET
DATE AUG 18 1995

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW all Plaintiffs and all Defendants, through their respective counsel, and hereby stipulate that the instant action in its entirety should be, and hereby is, dismissed without prejudice.

Respectfully submitted,

STATE OF OKLAHOMA ex rel.
DAVID MOSS, and DAVID MOSS
in his capacity as District Attorney
Tulsa County, District 14, Oklahoma

TV BINGO NETWORK, INC., MBMC ACQUISITION CORP., GORDON GRAVES, LARRY of MONTGOMERY, TV GAMES, INC., and MULTIMEDIA CREATIVE SERVICES, INC., Plaintiffs

STATE OF OKLAHOMA ex rel.
DAVID MOSS, and DAVID MOSS
in his capacity as District Attorney
Tulsa County, District 14, Oklahoma

By M. Denise Graham

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Attorney for Defendants

TV BINGO NETWORK, INC.,
MBMC ACQUISITION CORP.,
GORDON GRAVES, LARRY of
MONTGOMERY, TV GAMES, INC.,
and MULTIMEDIA CREATIVE
SERVICES, INC., Plaintiffs

By Donald M. Bingham

Donald M. Bingham, OBA #794
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, Oklahoma 74119-1010

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAULA ELICH and MARK ELICH Plaintiffs, vs. BLUE CROSS AND BLUE SHIELD OF OKLAHOMA, Defendant.	)	Case No. 94-CV-382-K

STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and hereby dismiss the above entitled cause with prejudice.

Paula Elich
PAULA ELICH

Mark W Elich
MARK ELICH

MARK THURSTON
Attorney for Plaintiffs

ANDREW B. MORSMAN
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIRGINIA COMBRINK, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, et al.,

Defendants.

Case No. 95-C-87-E

O R D E R

Now before the Court is the Defendants' Motion for Summary Judgment (Docket #25) and Plaintiffs' Motion for Summary Judgment (Docket #26). In these cross motions for summary judgment, the parties argue differing interpretations of 25 C.F.R. §11.104(c).

On April 5, 1993, Virginia Combrink was elected President of the Tonkawa Tribe. Tonkawa Tribal Council meetings were held on September 17, 1994 and October 14, 1994, which purported to remove Plaintiff as President of the Tonkawa Tribe. The Bureau of Indian Affairs (BIA) determined that those two meetings were not validly called and declined to recognize the results of those meetings. Subsequently, on December 3, 1994, a meeting was held which purported to remove Combrink as President and install Richard Cornell as President of the Tribe. On December 14, 1994, Julia Langan, Superintendent, Pawnee Agency, Bureau of Indian Affairs issued a decision recognizing the validity of the December 3, 1994 meeting.

On December 14, 1994, Cornell brought suit against Combrink in the Court of Indian Offenses (CIO) for the Tonkawa Tribe seeking a declaratory judgment establishing that he was the lawful Tonkawa tribal president. On December 21, 1994, the CIO held a hearing and

issued a preliminary injunction preserving the tribal government in existence on December 2, 1994, i.e. the Combrink government, until such time that a final decision could be made. The Bureau of Indian Affairs took the position that it had the right to make the determination of which government was the lawful government of the Tonkawa Tribe, and recognized the Cornell government.

On March 8, 1995, the CIO announced its final decision that Combrink was the current lawful President of the Tonkawa Tribe, and that the attempt to remove her was ineffective. Thereafter, the CIO issued a final written order, specifically declaring the December 3, 1994 Special meeting illegal and finding that any action taken therein was null and void and without effect. The Magistrate noted that the recall process is a Three-step process: 1) filing of a complaint; 2) a special council meeting to select an investigation committee; and 3) a special council meeting to provide a hearing to consider the recall, and, if necessary, elect successors. The Magistrate found that the first two steps had taken place, but the third one had not. Combrink appealed this Order, although she has since withdrawn that appeal.

The biannual tribal election was held on April 3, 1995. Combrink, claiming to be President, held the election at one time on that date, using one tribal roll, and Cornell, claiming to be President, held the election at a different time using a different tribal roll. Each of the two won their own election. The BIA recognized Cornell, after the April 3, 1995 elections, as the tribal President.

Plaintiffs brought this claim in January, 1995, contending that the COI, as the designated tribal forum, had the jurisdiction to determine election disputes, and that the BIA did not have any such jurisdiction. Plaintiffs contend that a proper construction of 25 C.F.R. §11.104 supports their position, and to the extent that it does not, it is invalid or unconstitutional. Both parties agree that the central question here concerns the interpretation and validity of 25 C.F.R. §11.104, and each side has filed a motion for summary judgment in support of its position.

Legal Analysis

This matter centers around a dispute as to whether the Bureau of Indian Affairs (BIA) or the Court of Indian Offenses (CIO) has the authority to determine the legal president of the Tonkawa Tribe. The legal issue is the validity or constitutionality of 25 C.F.R. §11.104(c). That regulation provides:

Jurisdictional Limitations

> (a) No Court of Indian Offenses may exercise any jurisdiction over a Federal or state official that it could not exercise if it were a tribal court.
> (b) Unless otherwise provided by a resolution or ordinance of the tribal governing body of the tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction, no Court of Indian Offenses may adjudicate an election dispute or take jurisdiction over a suit against the tribe or adjudicate any internal tribal government dispute.
> (c) The decision of the BIA on who is a tribal official is binding in a Court of Indian Offenses.
> (d) The Department of the Interior will accord the same weight to decisions of a Court of Indian Offenses that it accords to decisions of a tribal court.
> (e) A tribe may not be sued in a Court of Indian Offenses unless its tribal governing body explicitly waives its tribal immunity by tribal resolution or ordinance.

It is undisputed that the Tonkawa Tribe, by resolution T-R-60-93, authorized the COI to adjudicate election disputes as follows:

> Wherefore be it resolved that the Tonkawa Tribal Committee acting for and in behalf of the Tonkawa Tribe of Oklahoma, approves and authorizes the Court of Indian Offenses of the Tonkawa Tribe, Pawnee Agency, Anadarko area as the forum to adjudicate all election disputes or all other matters relating to contests involving challenges of the authority of an elected official to hold office.[1]

Defendants argue that, under the plain language of the regulation, the decision of the COI is subject to the approval of the BIA. Defendants are correct in their reading of §11.104. This, however, does not end the inquiry. The issue becomes one of the interpretation of §11.104 in light of other regulations, and of the validity of §11.104..

Plaintiffs argue that §11.104 is superseded by 25 C.F.R. §11.100(e) which provides:

> The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the Assistant Secretary--Indian Affairs or his or her designee, shall be enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe, and shall supersede any conflicting regulation in this part.

Plaintiffs also argue that §11.104(c) is void because it violates two federal statutes expressly protecting the right to determine who is a tribal official, and that §11.104(c) is inherently

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[1] Defendants argue, through the affidavit of Julia Langan, that in a special meeting dated December 23, 1994, the Tonkawa Tribal Council rescinded this resolution. However, since it was Cornell's tribal council that rescinded the resolution, the question is whether he had the authority to do so. To answer that question, it must be determined whether the legal tribal government was the one recognized by the BIA or the one recognized by the CIO.

arbitrary and unreasonable. The gist of Plaintiffs' attacks on §11.104(c) is that it interferes with a well established tribal right of self determination.

Plaintiffs first argue that tribal resolution T-R-60-93 constitutes an ordinance under §11.100(e) which would supersede §11.104(c). Defendants assert that that interpretation conflicts with the express language of the comments to the regulations, and that the comments indicate that the ordinances referred to in §11.100(e) deal with substantive laws and not procedural and jurisdictional statements. The comment upon which Defendants rely provides:

> One comment recommended deletion of Secretarial approval of tribal ordinances under §11.100(e). This recommendation was not adopted because Courts of Indian Offenses are Federal instrumentalities, and as such, the laws they enforce cannot be inconsistent with Federal law. Secretarial approval of tribal ordinances under §11.100(e) is necessary to ensure such compliance.

The Court does not interpret this comment to limit the application of §11.100(e) to the degree asserted by Defendants.

Rather, only by considering §11.100(e), can §11.104 be interpreted to be consistent with the inherent right of tribal self-government, which includes the right to resolve tribal election disputes. See Wheeler v. United States Department of the Interior, 811 F.2d 549. That court stated:

> Admittedly some special situations require Department action. If a tribe's constitution or its statutes call for the Department to take an active role in lawmaking, the Department may refuse to recognize laws that the tribal authorities have passed. . . . Furthermore, certain federal statutes require Department involvement in tribal matters. . . . Finally, since the Department is sometimes required to interact with tribal governments,

> it may need to determine which tribal government to recognize. Nevertheless, the Supreme Court has stated that "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." . . . Thus, even these special situations should be resolved in favor of tribal self -determination and against Federal Government interference.

Id. at 551-552 (citations omitted). To construe the regulations any other way would be to subvert the right of tribal sovereignty in this area of resolving tribal election disputes. Moreover, §11.104 cannot be used to undermine the well settled federal policy concerning tribal sovereignty.

In response to Plaintiff's assertion that §11.104 conflicts with tribal sovereignty, Defendants argue that the COI, itself, is a part of the government, not the tribe, in that the COI is created by regulation. Thus, they argue, there is no issue of §11.104 violating the right of tribal self-government, because the COI is not a tribal forum. While the COI is created by regulation, and thus a part of the federal government, it does not follow that the COI is therefore not a tribal forum which implicates the right of tribal self-government. This is true particularly in this instance where the COI only has jurisdiction over election disputes through a tribal resolution. See also Williams v. Lee, 358 U.S. 217, 222-223 (1959)(treating COIs as exercising tribal authority); Tillett v. Lujan, 931 F.2d 636 (10th Cir. 1991)(noting that COIs function as tribal courts and constitute that judicial forum by which the tribe can exercise its jurisdiction until the tribe adopts a formal law and order code); 25 U.S.C §3101.

Defendants also protest that, as a practical matter, they cannot wait on the COI to decide who the tribal officials are when they may need to conduct business with the lawful tribal government. In making this argument, Defendants imply that the BIA would only be affected by final decisions of the COI, which may take some time. Defendants' assumption is incorrect. For example, in this case, the COI made a determination within seven days that a temporary injunction should be issued which preserved the tribal government in effect on December 2, 1994. The practical difficulties envisioned by the Defendants did not occur in this case, and there is no reason to believe that they will occur in the future. Moreover, there is nothing to prevent the BIA from making a determination regarding tribal officials if the jurisdiction of the tribal court has not been invoked.

Plaintiffs motion for summary judgment (Docket #26) is granted. Defendants' motion for summary judgment (Docket #25) is denied. The parties are directed to inform the Court, in pleading form, within 15 days of the date of this Order, of any additional issues that may need resolving before entry of final judgment.

IT IS SO ORDERED THIS 17th DAY OF AUGUST, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARIWANA HUSSAINI-IBRAHIM
aka M. Hussaini-Ibrahim
aka Mariwana Hussaini;
MAGALENE I. HUSSAINI
aka Magalene Ferguson;
LANTANA AHMED;
TULSA ADJUSTMENT BUREAU, INC.;
CITY OF BROKEN ARROW, Oklahoma;
COUNTY TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-578-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16th day of August, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 3, 1995, pursuant to an Order of Sale dated May 11, 1995, of the following described property located in Tulsa County, Oklahoma:

LOT SIXTEEN (16), BLOCK ONE (1), WINDSOR ESTATES SECOND, AN ADDITION TO THE CITY OF BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, **Mariwana Hussaini-Ibrahim,**

through his Attorney, Marcus S. Wright, Magalene I. Hussaini, Tulsa Adjustment Bureau, Inc., through its Attorney, D. WM. Jacobus, Jr, the City of Broken Arrow, Oklahoma, through its City Attorney, Michael R. Vanderburg, County Treasurer and Board of County Commissioners, through Dick A. Blakeley, Assistant District Attorney, by mail, and to the Defendant, **Lantana Ahmed**, by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Broken Arrow Ledger, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the

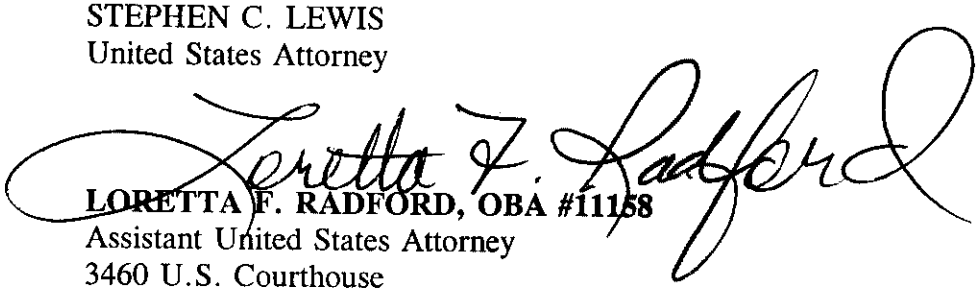
purchaser be granted possession of the property against any or all persons now in possession.

S/Frank H. McCarthy
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
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3460 U.S. Courthouse
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LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-578B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAM HICKERSON, individually and as next friend for CHRISTOPHER HICKERSON, a minor, and ANDREA K. HICKERSON, a minor,

Plaintiffs,

vs.

THOMAS WILLIAM MEENTS, PAUL SHAFER, JIM HARBUCK, ROY SUMPTER, LARRY JARRETT and KEITH ADDISON,

Defendants.

Case No. 94-C-923-B

O R D E R

Before the Court are: (1) a Motion to Dismiss, or, in the alternative, Motion for Summary Judgment, filed by Defendant Paul Shafer (Docket #10); (2) a second Motion for Summary Judgment, filed by Defendant Paul Shafer (Docket #45); (3) a Motion to Dismiss, or in the alternative, Motion for Summary Judgment, filed by Defendant Thomas William Meents (Docket #12); (4) a Motion for Partial Summary Judgment, filed by Plaintiffs Pam Hickerson, Christopher Hickerson and Andrea Hickerson (Docket #17); and (5) a Motion for Summary Judgment, filed by Defendants Jim Harbuck, Roy Sumpter, Larry Jarrett and Keith Addison (Docket #48).

Plaintiffs' claims are based upon the death of Michael Hickerson on July 22, 1994, which occurred while he was attending a Monster Truck drag race in Claremore, Oklahoma. After considering the issues presented by the pleadings, the record, the arguments of counsel and the applicable legal authority, the Court concludes that material issues of fact remain. The basis for such

a conclusion results from the following uncontroverted facts and legal analysis:

I. UNCONTROVERTED FACTS

1. Michael E. Hickerson ("Hickerson") died on July, 22, 1994, in Claremore, Oklahoma, while attending the Fifth Annual Claremore Mud Racing and Monster Truck Challenge at the Will Rogers Roundup Club. (Plaintiffs' Amended Complaint, ¶¶ 1, 4)

2. One of the trucks participating in the drag race left the performance area, striking Hickerson and killing him. (Plaintiff's Amended Complaint, ¶ 4)

3. The driver of the truck that struck Hickerson was Defendant Thomas William Meents. (Shafer's June 29, 1995, Motion for Summary Judgment, Exh. C, p. 135)

4. The owner of the truck that struck Hickerson was Defendant Thomas William Meents. (Id.)

5. A Release and Waiver of Liability and Indemnity Agreement ("Waiver"), which releases Defendants from liability for any injury occurring during the Monster Truck rally, has a signature purported to be that of Hickerson. (Shafer's December 2, 1994, Motion for Summary Judgment, Exh. B)

6. Expert testimony indicates that Hickerson did not sign the Waiver. (Plaintiffs' Motion for Summary Judgment, Exh. 2)

7. Defendants Jim Harbuck, Roy Sumpter, Larry Jarrett and Keith Addison were the promoters and organizers of the Fifth Annual Claremore Mud Racing and Monster Truck Challenge, during which

Hickerson was killed. (Plaintiffs' Amended Complaint, ¶ 7)

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is

> no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. LEGAL ANALYSIS

A. Defendant Shafer's Motion to Dismiss/ Motions for Summary Judgment

Defendant Paul Shafer[1] first alleges that the claim against him should be dismissed because Hickerson signed a Waiver, which essentially releases the Defendants from liability for Hickerson's death. (Shafer's December 2, 1994, Motion for Summary Judgment,

[1]Shafer filed his Motion to Dismiss, or, in the alternative Motion for Summary Judgment on December 2, 1994. The parties were granted further discovery time before the Court ruled on the Motion. After discovery, Shafer filed a Motion for Summary Judgment on June 29, 1995. The Court treats both motions contemporaneously in this section.

Exh. B) However, Plaintiffs have provided undisputed evidence that indicates Hickerson did not sign the Waiver. (Plaintiffs' Motion for Summary Judgment, Exh. 2) Therefore, the claim against Shafer cannot be dismissed on this basis.

Shafer also alleges that, as the former owner of the truck Meents was driving, he cannot be liable for death of Hickerson; therefore, summary judgment should be entered in his favor.[2] Plaintiffs allege, however, the Meents was acting as an agent of Shafer. In support of this contention, they point to evidence in the record that indicates an agency relationship between Shafer and Meents. Shafer derived personal benefit from Meents' appearance at the Claremore rally. (Plaintiffs' Response Brief, Exh. B, p. 8-9) Shafer sold to Meents a monster truck with an appearance identical to that of Shafer's monster truck. (Id. at 91) Promotional pictures of the truck used for the Claremore rally were taken with Shafer driving the vehicle. (Id. at 16) Shafer had personally contracted to appear at the Claremore event before selling the monster truck to Meents. Further, Shafer also was committed to appear on the same date in Ohio and needed Meents to cover the Claremore event to prevent damage to Shafer's reputation in the racing community. (Id. at 113-15) Shafer retains some control over Meents pursuant to the terms of a licensing agreement, including the appearance of the monster truck and refusing to allow Meents to appear at events not offering fees of at least $2,500. (Id. at 111-

[2]Plaintiffs originally alleged that Shafer was the owner of the truck.

12) The contract between Shafer and Meents requires Meents to pay half his gross revenues from special events. (Plaintiff's Response Brief, Exh. C)

Shafer points to the sales and license agreements signed by Meents and Shafer as evidence that neither agency nor joint venture are established. (Id.) Further, Shafer alleges he had neither the right nor the opportunity to control Meents' operation of the monster truck at the Claremore rally. "Agency is generally a question of fact to be determined by the trier of fact", unless the evidence before the Court is undisputed. Bell v. Tollefsen, 782 P.2d 934, 938 (Okla. 1989). *See also* Agee v. Gant, 412 P.2d 155 (Okla. 1966). The Court finds there is a disputed issue of fact as to whether Shafer and Meents had an agency or joint venture relationship. Therefore, Shafer's Motion for Summary Judgment is denied.

B. Defendant Meents' Motion for Summary Judgment

Defendant Meents' Motion for Summary Judgment is based on the Waiver allegedly signed by Hickerson. However, as stated above, Plaintiffs have provided uncontroverted evidence indicating that Hickerson did not sign the Waiver. Therefore, Meents' Motion for Summary Judgment is denied.

C. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs seek partial summary judgment on the issue of whether Hickerson signed the Waiver. They also ask the Court to

determine, as a matter of law, that the bargaining power was vastly disparate between the parties to the Waiver; therefore, the Waiver is unenforceable even if Hickerson did sign it.

Plaintiffs provide affidavits from a handwriting expert who states that Hickerson, in the expert's opinion, did not sign the Waiver. (Plaintiff's Motion for Summary Judgment, Exh. 2) Defendants have not provided contradictory evidence. The Court concludes as a matter of law that Hickerson did not sign the Waiver; therefore, Plaintiffs' Motion for Summary Judgment is granted in part. The Court does not find, however, that the Waiver is unenforceable due to disparate bargaining power between the parties; therefore, Plaintiffs' Motion for Partial Summary Judgment is denied in part.

D. Defendants Harbuck, Sumpter, Jarrett and Addison's Cross-Motion for Summary Judgment

Defendants Harbuck, Sumpter, Jarrett and Addison ("the Promoters") seek summary judgment that Plaintiffs' claims are barred. They allege that, even if Hickerson did not sign the Waiver, he was bound by its terms via implied consent, estoppel or ratification. They allege that any person gaining access to restricted areas at such events must sign a Waiver in exchange for an armband that means the person is authorized to be in the area (Defendants' Cross-Motion for Summary Judgment, Exh. A, p. 44) At Hickerson's direction, his son Christopher, a plaintiff in this case, obtained the armbands for his family. Christopher Hickerson told his parents that they must sign Waivers. (Id. at p. 56, 60;

Exh. C, p. 17) The Plaintiffs did sign the Waiver. (Exh. A at p. 48; Exh. C at p. 17; Exh. D at p. 6; Exh. E) Hickerson has signed numerous such Waivers in the past; therefore, the Promoters allege, he knew of the requirement and is estopped from denying its validity since he accepted the benefit of being in the restricted area. (Exh. A, p. 55; Exh. B at p. 64)

Plaintiffs contend, however, that the restricted area did not solely contain people with armbands; rather, there were children present without armbands and with the knowledge of the defendants. (Plaintiff's Response Brief, Exh. A at p. 40) Further, Plaintiffs allege that Christopher Hickerson did not tell officials that the armbands were for his family when he picked them up. (Plaintiff's Response Brief, Exh. B at 18)

The Court determines that a factual dispute exists that is sufficient to preclude summary judgment on this claim. Therefore, the Promoter's Motion for Summary Judgment is denied.

IT IS SO ORDERED this 16th day of August, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CLOVER GALLIMORE,)
)
Plaintiff,)
)
v.) Case No. 94-C-1115K
)
AMERADA HESS CORPORATION,)
)
Defendant.)

ENTERED ON DOCKET

DATE AUG 18 1995

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 15 day of ~~July,~~ August 1995, upon the parties' Joint Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's cause of action against Defendant is hereby dismissed with prejudice, with each party to bear its own costs and attorneys' fees.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

DKM-3714.0

10

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES WAGNON and LORALEE WAGNON, Husband and Wife, Plaintiffs,	)	Case No.94-C-972-B
vs.	)	
STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	)	

ORDER

This Court has for decision: 1) a Motion for Reconsideration by the defendant, State Farm Fire and Casualty Company,("State Farm" or "Defendant") and Motion to Certify Question Of Law To The Supreme Court Of Oklahoma. (Docket Entry # 20); and 2) a Motion by plaintiffs, Charles Wagnon and Loralee Wagnon, (hereinafter "Plaintiff" or "Wagnon") to extend discovery cutoff to August 17, 1995. (Docket Entry # 32). Defendant has not responded to Plaintiffs' motion to extend discovery and the same will be GRANTED.

In an earlier Order the Court denied State Farm's Motion For Summary Judgment on the contract issue (and the tort issue), concluding that the two year statute of limitation applies herein rather than the one year period as argued by State Farm. State Farm seeks a reconsideration of the Court's decision, arguing that Oklahoma intermediate appellate courts have, in unpublished opinions in similar cases, ruled that a one year period of limitation is applicable. State Farm asks the Court to, in effect, vacate its earlier Order and then certify the matter to the Supreme

Court of Oklahoma.

There are two immediate answers to State Farm's Motion: 1) State Farm acknowledges "there does not exist controlling precedent as to the application of the statutory one-year statute of limitations found within the Oklahoma Standard Fire Insurance Policy for theft claims where such coverage is also provided"[1]; and 2) Oklahoma's Rules of Appellate Procedure in Civil Cases specify that unpublished opinions such as State Farm has submitted are entitled to no precedential value. Rule 1.200(E) states:

> "All memorandum opinions, unless otherwise required to be published, shall be marked: "Not for Official Publication." Because unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked shall not be considered as precedent by any court or in any brief or other material presented by any court, except to support a claim of res judicata, collateral estoppel, or law of the case."

Every Motion filed with the Clerk of this Court, no matter whether meritorious, repetitious or frivolous, requires some portion of this Court's limited resources.[2] The Court, as the Honorable Wayne Alley[3] once observed, is not just "hitting fungoes" when it enters an Order.

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[1] State Farm also states the unpublished opinions of the cases are "very similar" to the case at bar. The Court concludes the similarity is not compelling.

[2] The Court notes that both parties have filed motions for summary judgment on the same issue (the alleged misrepresentations by Plaintiff effecting avoidance of coverage under the policy) as that concluded by the Court to be an issue of fact for the trier of fact which, in this instance, will be the Court.

[3] United States District Judge for the Western District of Oklahoma.

On the other hand, the Court is indebted when a party, through a Motion to Reconsider, brings to its attention an oversight. It is the automatic or standardized use of Motions To Reconsider which gives the Court pause. In this instance the Court considers the Motion To Reconsider and Motion To Certify as inappropriate and each is accordingly DENIED.

IT IS SO ORDERED this 16th day of August, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 16 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BILLY W. CASEY,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 94-C-658-J

ENTERED ON DOCKET
DATE AUG 17 1995

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Administrative Law Judge has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 16 day of August 1995.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY W. CASEY,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 94-C-658-J

ORDER

Plaintiff Billy W. Casey, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.[2/] Plaintiff contends that: (1) the ALJ's finding that Plaintiff's ability to work was not significantly compromised by his mental impairment is not supported by substantial

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[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2/] Plaintiff filed applications for supplemental security income and disability insurance benefits on March 13, 1985 claiming disability from May 1984 due to high blood pressure, a back injury, and bowel problems. Plaintiff's initial application was rejected, and in his request for reconsideration, Plaintiff additionally alleged mental problems. Plaintiff's applications were denied by an Administrative Law Judge ("ALJ"), and the denial was affirmed by the Appeals Council. *R. at 10-19.* Plaintiff appealed, and on January 27, 1988, the Secretary's decision was reversed with an instruction to the ALJ to order a psychiatric evaluation and take testimony from a vocational expert. During the second hearing before the ALJ, Plaintiff was not permitted to cross-examine two expert witnesses (a psychiatrist and a psychologist who examined Plaintiff). Following an appeal from the decision of the ALJ to deny benefits, the Court again reversed, ordering the ALJ to allow Plaintiff an opportunity to cross-examine the witnesses. *R. at 660-61.* A third hearing occurred on October 5, 1992, at which time Plaintiff was permitted to cross-examine the medical expert witnesses. On April 23, 1993, the ALJ again determined that Plaintiff was not disabled, and denied benefits. *R. at 569.* On May 10, 1994, the Appeals Council denied Plaintiff's request for review. *R. at 541-42.*

evidence, and (2) the record does not support the ALJ's finding that Plaintiff has the residual functional capacity to work.

A decision by the Secretary will be upheld on appeal if it is supported by substantial evidence and follows applicable legal standards. See Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). For the reasons outlined below, the Court affirms the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on April 26, 1937 and has the equivalence of a high school education. *R. at 424.*[3/] Plaintiff's past work experiences include jobs at a filling station, as a carpenter's helper, at an oil field, and laying tile and carpet. *R. at 44-45, 223.*

Plaintiff's Prior Disability

Plaintiff was previously determined disabled in 1973 due to "severe emotional problems." *R. at 178.* In May of 1977, Plaintiff began working as a gas station attendant. *R. at 182.* A Social Security reviewer determined that Plaintiff's work constituted substantial gainful activity, and Plaintiff's disability ended in February 1978, with Plaintiff's disability payments continuing until April 1978. *R. at 186.* According to Plaintiff, he reinjured his back in 1978 and was again unable to work, but his disability ended because he failed to timely appeal the termination of his benefits. *R. at 49.*

[3/] Plaintiff completed the eighth grade, and passed his GED in 1969. *R. at 44-45.*

Plaintiff's Current Disability Claim

On March 13, 1985 Plaintiff again filed for disability, claiming disability beginning on May 17, 1984, based on back and leg pain, weakness, and bloating. *R. at 229.* After the initial denial of his claim, Plaintiff filed a reconsideration of disability based on his "mental condition" because he "couldn't stand to be around anybody." *R. at 237.*

Plaintiff's Medical Examinations

Plaintiff's current disability claim appears to originate from a May 16, 1984 incident when, according to Plaintiff, Plaintiff's boss hit and struck him in the left jaw and knocked him unconscious. *R. at 283.* Plaintiff was taken to the emergency room, treated for a laceration to his left cheek, and discharged. *R. at 283.* After his discharge, Plaintiff began to complain of low back pain, neck pain, shoulder pain, headaches, and dizziness. *R. at 283.*

Plaintiff was admitted to the hospital based on these complaints on May 23, 1984. *R. at 279.* Numerous tests were performed on Plaintiff.[4/] *R. at 285-304.* Plaintiff was discharged on June 12, 1984, after twenty days of hospitalization because "it was felt that the patient had had maximum benefit from his hospitalization." *R. at 282.*

[4/] X-rays of the skull revealed no intracranial pathology. *R. at 289.* X-rays of the back indicated degenerative disc disease. *R. at 289.* An upper G.I. series indicated no abnormality of the stomach or duodenum. *R. at 290.* A cholecystogram indicated no abnormality of the gallbladder. *R. at 291.* An abdominal sonogram showed a normal echo pattern, and a normal kidney. *R. at 292.* An electroencephalogram was interpreted as normal during waking, drowsiness and light sleep tracings. *R. at 293.* In addition, an electrocardiogram was interpreted as being within normal limits. *R. at 294.*

According to his doctor's admission report, Plaintiff continued to complain of headaches, vertigo, blurred vision, lumbar back pain, and left shoulder pain. *R. at 301.* Consequently, Plaintiff was again admitted to the hospital on August 17, 1994. *R. at 301.* Numerous tests were again performed.[5/] Numerous doctors were also consulted (e.g. an orthopedic doctor, an internist-cardiologist, an ENT physician, and a pain specialist) with no revealing results. *R. at 302-303.* Plaintiff was discharged on September 4, 1984, after 19 days of hospitalization because "it was felt that he had had maximum benefit from his hospitalization." *R. at 301-03.* Plaintiff was placed on a regular diet, given several medications (some for pain), and "was to walk as much as possible in the early a.m. and late evening." *R. at 303.*

An April 1, 1985 letter from Dr. Bartlett, Plaintiff's treating physician, states that Plaintiff "remains totally disabled for gainful occupation. His condition remains basically unimproved." *R. at 329.* To support this conclusion, Dr. Bartlett references his September 16, 1984 report,[6/] and Plaintiff's hospital records. *R. at 329.*

On August 1, 1986, the doctor's notes state that, "[t]he patient admits that his symptoms remain well controlled by his current meds [medications], and he denies any complaints at this time." *R. at 372.*

[5/] A urinalysis was negative. *R. at 301.* Plaintiff was placed on physical therapy exercises for spinal and left shoulder contusions and strain. *R. at 302.* A glucose tolerance test showed a normal response. *R. at 302.* A brain scan and flow study, and a CT brain scan showed normal. *R. at 302.* An electroencephalogram showed abnormal tracing because of focal slowing, but indicated no other focal or generalized abnormalities. *R. at 302.*

[6/] Dr. Bartlett's September 16, 1984 report summarizes Plaintiff's two hospitalizations. *R. at 319-322.*

Plaintiff was examined on March 9, 1988 by Dr. Richard A. Felmlee. Dr. Felmlee noted that:

> when asked to do flexion, extension, side bending and rotation, the patient could come close to touching his toes and within three inches of the floor. Extension was normal range of motion with approximate loss of three to four degrees. . . . Straight leg raising test was within normal limits. . . . Rotation is approximately 80 degrees both right and left and the patient did not experience any pain when performing either one of these maneuvers.

R. at 476. Dr. Felmlee concluded that Plaintiff did not meet the requirements for disability benefits. *R. at 476.*

Plaintiff was examined by Dr. James D. Harris on May 11, 1992. *R. at 667.* Dr. Harris concluded that Plaintiff could no longer participate in heavy labor. In addition, "he does not have the academic skills for significant sedentary type of vocation or cognitive type work. I feel finding a gainful employment for this gentleman would be extremely difficult with his limited physical and cognitive skills." *R. at 668.*

Residual Functional Capacity Assessments

Plaintiff's Residual Functional Capacity Assessment, conducted May 8, 1985, indicated that Plaintiff had the capability of lifting a maximum weight of fifty pounds, with frequent lifting and carrying of twenty-five pounds. *R. at 255-56.* In addition, Plaintiff can stand/walk for about six hours in an eight hour day, sit for about six hours in an eight hour day, and push or pull for an unlimited amount of time in an eight hour day. *R. at 255.* Plaintiff's ability to stoop and crouch are occasionally limited, but his ability to climb, balance, kneel, crawl, reach, handle, finger, feel, see,

hear and speak were rated as "unlimited." *R. at 255.* A second Residual Functional Capacity Assessment reported similar findings. *R. at 262-263.*

Mental Evaluations

A December 30, 1985 report by Dr. Ronald C. Passmore indicates that Plaintiff has "somatoform reaction." *R. at 342.* The report states that Plaintiff "does show some evidence of psychogenic pain disorder in that there is secondary gain by not working." *R. at 343.*

Dr. Passmore also testified at Plaintiff's 1992 hearing. *R. at 603.* In his 1985 and 1988 examinations of Plaintiff he diagnosed somatoform disorder with evidence of psychogenic pain. *R. at 605.* However, the Listings[7/] do not apply to Plaintiff. *R. at 605-09.* According to Dr. Passmore, the examination probably lasted 45 minutes, and Dr. Passmore believes Plaintiff capable of concentrating for at least 45 minutes at a time, which is sufficient concentration for a job. *R. at 611-12.* Dr. Passmore's opinion is that Plaintiff's pain was real to the Plaintiff. *R. at 614.*

A January 24, 1986 Psychiatric Review indicated that Plaintiff had somatoform disorders,[8/] but any impairment was described as "not severe." *R. at 264.* The doctor noted that, "[Plaintiff] does show some evidence of psychogenic pain in that there is secondary gain by not working. The medical evidence does not indicate the presence of any psychiatric impairment that would significantly restrict his ability to

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[7/] The Listings constitute Step 3 of the sequential Evaluation process. 20 C.F.R. Pt. 404, Subpt. P, App. 1.

[8/] "Somatoform disorder" is described as "physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms." 20 C.F.R. Pt. 404, Subpt. P, App. 1.

work." *R. at 265.* Specifically, the degree of limitation[9/] placed on Plaintiff for restrictions of activities in daily living, difficulty in maintaining social functioning, deficiencies of concentration, persistence of pace, and episodes of deterioration, were all marked "none." *R. at 271.*

With respect to potential psychiatric impairments, a Medical Consultant Review Form, dated January 9, 1986, stated that Plaintiff exhibited "no evidence of a significant mental impairment." *R. at 274.*

On March 8, 1988, a psychological evaluation was conducted by Warren L. Smith, Ph.D. Dr. Smith concluded:

> [T]here is a minimal restriction of daily activity. His interests are fairly intact. Personal habits are pretty good. Fairly well-motivated. No obvious limitations of motor function, although his back bothers him when he sits in a chair. Affect is somewhat disturbed. He is probably mildly disturbed. He is probably mildly depressed and anxious. He seems to be kind of a "loner" individual. He can guide and direct his own life. He can dress and groom himself, avoid common dangers and deal with simple emergencies. No obvious decrement of intelligence or memory. He can carry on a rational conversation. His thoughts are not disturbed or confused. Reality testing is intact despite the fact that at one time he obviously suffered from a schizophrenic episode. He can read, write and calculate. He can understand simple job instructions and carry them out. He can sustain work performance if it were in his physical capabilities. He could cope with work pressures and get along fairly well with co-workers and supervisors. He is sufficiently intact to handle his own finances.

R. at 479-80 (emphasis added).

[9/] Mental impairments are evaluated based upon the degree of functional loss, from none, to a level of severity which is incompatible with the ability to perform work. 20 C.F.R. § 404.1520a(b)(3).

Dr. Smith, also testified at Plaintiff's October 5, 1992 hearing. *R. at 581.* Dr. Smith stated that he had been a psychologist for forty years. *R. at 581.* Dr. Smith did not specifically recall examining Plaintiff in 1988, but testified from his 1988 report. *R. at 582-85.* A typical examination lasts one and one-half hours. *R. at 583.* Dr. Smith's findings did not indicate that Plaintiff has a somatoform disorder, but he diagnosed Plaintiff as having psychological factors affecting his physical condition. *R. at 590-91.* Dr. Smith did not believe that Plaintiff suffered from any delusions or hallucinations, and thought Plaintiff exhibited no distortions of reality. *R. at 593.* Dr. Smith's conclusion in his 1988 report that Plaintiff would be able to work, if the work requirements were within his physical capabilities, was based upon his clinical judgment, and he cannot presently recall any specifics related to Plaintiff's examination. *R. at 602.*

A March 29, 1988 evaluation signed by Sandra Crittendon, Therapist, and Elizabeth Taylor, D.O., diagnosed Plaintiff with somatization disorder. The evaluation notes that Plaintiff "has difficulty remembering and carrying out simple or complex instructions due to constant physical complaints and distrust of others. Due to these issues, it is doubtful that he would respond appropriately to work pressure, supervision and co-workers." *R. at 497.*

Plaintiff's Testimony

At his hearing on July 9, 1986, Plaintiff testified that he experienced a lot of pain, but had been told that it was "in his head." *R. at 47.* Plaintiff testified that he becomes short of breath when he walks uphill approximately 100 feet, and has

sometimes experienced dizziness from high blood pressure. *R. at 50.* Plaintiff walks to most of the places he visits, and sometimes tries to collect aluminum cans for income. *R. at 54-55.* According to Plaintiff, his legs swell if he does not take his medicine. *R. at 51.* Plaintiff testified that the more he walked the worse he hurt, so he simply sat around.[10/] *R. at 54.*

On his Request for Hearing (February 7, 1986), Plaintiff noted that he disagreed with the determination because, "I walk to town a mile and quarter away and walk back and my legs just don't want to carry me and I have to go to bed." *R. at 219.* On his Request for Reconsideration Plaintiff stated, in response to his daily activities, that "I live in a shack on the levee. I have to find wood for fire, carry water, [and] walk a few blocks to county social services for supper." *R. at 239.*

At his second hearing, on June 16, 1988, Plaintiff stated that "I don't ever feel good. When I eat, sometimes I bloat up. I can't hardly breath [sic]." *R. at 430.* Plaintiff believes that he would be unable to work for eight hours a day because of his lack of strength. *R. at 431.*

Plaintiff testified that he walks to the shelter, which is approximately four blocks away, about two times each week. *R. at 433-34.* In addition, Plaintiff walks to the Cline Smith Clinic, for treatment, about once every two weeks. *R. at 434-35.*

Plaintiff testified that he was prevented from working because of his back pain. *R. at 438.* Plaintiff noted that if he did not take his pain medicine he "would go out

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[10/] Plaintiff also testified that a Dr. Bartland (Plaintiff may have been referring to Dr. Bartlett) placed standing and sitting restrictions upon his activities and requested that Plaintiff lift no more than five to ten pounds. *R. at 56.* The record does not support Plaintiff's statements.

of his mine [sic]," and that even with the pain medicine he still sometimes has pain. *R. at 438.* Plaintiff also has pain after he sits for about an hour. *R. at 438.* Plaintiff stated that his legs are weak and start to swell and hurt after walking for ten to fifteen minutes. *R. at 439.* Plaintiff also has headaches and pressure inside of his head, and takes Motrin for it. *R. at 439.* In addition, Plaintiff's gut swells after he eats. Plaintiff testified that "I just can't do nothing. I can't hardly breath [sic]. Sometimes I start walking after I eat and then I pass out; I get dizzy. And huffing and puffing like I ain't going to make it." *R. at 440.* According to Plaintiff, he is also nervous around people, which hinders his concentration. *R. at 440.* Plaintiff believes that he would not be able to handle a job unless he was able to lay down for about two hours, twice each day. *R. at 440-41.*

At Plaintiff's third hearing on October 5, 1992, Plaintiff testified that his back still hurt, and that he suffered from arthritis, leg swelling, and headaches. *R. at 621.* He stated that he could get along with people if they did not aggravate him, but that he did not like to be around people. *R. at 622.* Plaintiff stated that he assists a lady who runs a weigh station by mopping the floor about once every two weeks, sweeping it about every three days, and sometimes weighing a truck (which requires pushing a button). *R. at 623.* He thinks he can lift about 15-20 pounds, but he cannot hold it very long. *R. at 624.* He can sit for about an hour, but has difficulty getting up. *R. at 624.* He can stand for about thirty minutes. *R. at 624.* Plaintiff also made a table and bed for the house where he is currently living from some old boards. *R. at 625.*

II. THE SEQUENTIAL EVALUATION PROCESS

A claimant is disabled under the Social Security Act if:

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Secretary has established a five-step[11/] sequential process for the evaluation of social security claims. See 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The ALJ's evaluation of Plaintiff's claim in this case terminated at step five of the sequential evaluation process. The ALJ determined that Plaintiff had the residual functional capacity to perform light work, and that Plaintiff's residual functional capacity was not impaired by his mental condition. *R. at 567, 571.* The ALJ found that Plaintiff was not entitled to disability insurance benefits under Title II of the Social

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[11/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal to or the medical equivalence of an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Security Act because Plaintiff was not disabled on or before December 31, 1987. *R. at 567.* With respect to Supplemental Security Income, the ALJ determined, in accordance with the Medical-Vocational Guidelines (the "Grids") that Plaintiff was presumptively disabled on April 26, 1992, when Plaintiff became 55. Plaintiff was awarded benefits beginning April 26, 1995. *R. at 567.*

III. STANDARD OF REVIEW

The Secretary's disability determinations are reviewed, on appeal, to determine if: (1) the correct legal principles have been followed, and (2) the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Williams, 844 F.2d at 750. The Court, in determining whether the decision of the Secretary is supported by substantial evidence does not reweigh the evidence or examine the issues *de novo*. Sisco v. U.S. Dept. of Health and Human Services. 10 F.3d 739, 741 (10th Cir. 1993).

Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

IV. REVIEW

Mental Impairment/Substantial Evidence

The ALJ summarized Plaintiff's psychiatric examinations, his I.Q. evaluations, and his medical (psychiatric and physical) history. *R. at 563-67.* The ALJ concluded that Plaintiff has the physical ability to engage in light work activity, and that Plaintiff's ability was not significantly compromised by his "mental impairment." *R. at 567.* Because the ALJ determined that Plaintiff's RFC was not affected by Plaintiff's mental impairment, the ALJ applied the Medical-Vocational Guidelines (the "Grids")[12/] in determining Plaintiff's disability status.

Based on the Grids, the ALJ concluded that Plaintiff was not disabled until April 26, 1992, when Plaintiff became 55. *R. at 567.* To qualify for disability insurance, Plaintiff must have been found disabled on or before December 31, 1987. *R. at 567.* Consequently, the ALJ determined that Plaintiff was not entitled to disability. *R. at 567.* With respect to supplemental security income, the ALJ determined that Plaintiff was entitled to disability commencing April 26, 1992, based on the Grids. *R. at 567.*

Plaintiff initially argues that the ALJ lacked substantial evidence to find that Plaintiff's ability to do light work was not significantly compromised by Plaintiff's mental impairment. Plaintiff acknowledges that he does not meet or equal a "Listing,"[13/] but argues that the failure to meet a Listing does not render his mental

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[12/] See 20 C.F.R. Pt. 404, Supbt. P, App. 2.

[13/] An individual who meets or equals a Listing (20 C.F.R. Pt. 404, Subpt. P, App. 1) is presumed disabled. "Somatoform Disorders" are described at Listing 12.07. Plaintiff does not assert any error with respect to the ALJ's application of the Listings.

impairment insignificant. Plaintiff asserts that the ALJ failed to properly weigh the severity of Plaintiff's mental impairment in determining Plaintiff's RFC, and in determining Plaintiff's disability status.

The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas.[14/] 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none," "never," "slight," or "seldom," the conclusion is that "the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of [the claimant's] mental ability to do basic work activities." See 20 C.F.R. § 1520a(c)(1). Although the regulations do not specify that a rating above "none" or "slight" is presumed "severe," that is the logical inference. See Hargis v. Sullivan, 945 F.2d 1482, 1488 n.5 (10th Cir. 1991).

If the mental impairment is severe, the Listings must be consulted. 20 C.F.R. § 1520a(c)(2). If a claimant meets or equals a Listing, the claimant is disabled. 20 C.F.R. § 1520a(c)(2). If a claimant does not meet or equal a Listing, the claimant's residual functional capacity must be assessed to determine the level, if any, of the claimant's impairment. 20 C.F.R. § 1520a(c)(3). An ALJ must attach a Psychiatric Review Technique form ("PRT") detailing the ALJ's assessment of the claimant's level of mental impairment, to his decision. 20 C.F.R. § 1520a(d).

[14/] The four areas are: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3).

In this case, with respect to Plaintiff's mental functional limitations, the ALJ determined the following:

> (1) restrictions of activities of daily living -- slight;
> (2) difficulties in maintaining social functioning -- moderate;
> (3) deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner -- never;
> (4) episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms -- once/twice.

R. at 571-72. Plaintiff's functional assessment, according to the ALJ, although not rising to the level of a listing is nevertheless severe.[15/] Consequently, the ALJ was required to assess Plaintiff's RFC, giving due consideration to Plaintiff's mental impairment. 20 C.F.R. § 404.1520a(c)(3); Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 85-16 (West 1985).

The ALJ initially determined that Plaintiff had the RFC to perform light work.[16/] This conclusion is supported by substantial evidence. Two separate RFC assessments indicate that Plaintiff had the capability of lifting 50 pounds, with frequent lifting of 25 pounds, the ability to stand/walk six hours in an eight hour day, and sit for six hours in an eight hour day. *R. at 255, 262-63.* In addition, Plaintiff's

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[15/] The ALJ's functional assessment of Plaintiff as "moderate," in maintaining social functioning, and "once/twice" for episodes of deterioration/decompensation, according to the regulations, means that the ALJ's assessment of Plaintiff's mental impairments does not qualify as "not severe." 20 C.F.R. § 1520a(c)(1); Cruse v. United States Dep't of Health & Human Services, 49 F.3d 614, 618 (10th Cir. 1995).

[16/] "Light work" requires "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . ." 20 C.F.R. § 404.1567(b).

ability to climb, balance, kneel, crawl, reach, handle, finger, feel, see, hear, and speak were rated as "unlimited." *R. at 255, 262-63.* Plaintiff testified that he walks to most places he visits, located wood for his fire, carried water, mopped the floor, and made a bed and table out of old boards. *R. at 54-55, 239, 625.* Dr. Felmlee examined Plaintiff on March 9, 1988, and concluded that Plaintiff was not disabled. *R. at 476.* Although Plaintiff's treating physician, Dr. Bartlett, on April 1, 1985, stated that Plaintiff "remains totally disabled for gainful occupation," the basis for Dr. Bartlett's statement was Plaintiff's hospital record and Dr. Bartlett's previous report (September 1, 1985), which summarized Plaintiff's two hospital admittances. The ALJ properly concluded that Dr. Bartlett's conclusory statement was not supported by the hospital records.[17/] Substantial evidence supports the ALJ's determination that Plaintiff could engage in "light work."

However, the ALJ is also required to determine how Plaintiff's mental impairment impacts Plaintiff's RFC. 20 C.F.R. § 1520a(c)(3). The ALJ determined that Plaintiff's ability to engage in light work was not significantly compromised by his mental impairment. *R. at 567.* The ALJ's finding is supported by substantial evidence.

The impact of a mental impairment on a plaintiff's RFC is determined based on the effect the mental impairment has on a Plaintiff's ability to work. The four areas considered essential to work are: (1) activities of daily living, (2) social functioning,

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[17/]A treating physician's report may be disregarded when such a report is brief, conclusory, or unsupported by medical evidence. See, e.g., Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

(3) concentration, persistence, or pace, and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3).

Although Plaintiff's medical records indicate that Plaintiff had severe emotional problems which resulted in a prior disability (1973),[18/] Plaintiff's more recent records (1985-present), indicate that Plaintiff's emotional problems do not interfere with his ability to work. At least one psychiatric evaluation rated Plaintiff's impairment, in each of the above categories as "none."[19/] Dr. Smith concluded that Plaintiff's ability to engage in work was not limited by his mental impairment.[20/] Dr. Passmore rated Plaintiff's abilities as "unlimited/very good" and "good" in all but two of fifteen categories on the Mental Assessment of Ability to do Work-Related Activities (Mental) form.[21/] The record contains substantial evidence to support the ALJ's finding that

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[18/] Plaintiff apparently had a variety of emotional problems from 1968-1973. Plaintiff was described as delusional, with borderline major hysteria with conversion reactions, and possibly schizophrenic. *R. at 107.*

[19/] A Psychiatric Review Technique form, completed by Dr. H.J. Bindler on January 24, 1986, indicates that any mental impairments are "not severe." *R. at 264.* The degree of limitation placed on Plaintiff's Functional Limitations are all indicated as either "none," or "never." *R. at 271.* In addition, a January 9, 1986 Medical Consultant Review Form indicates that Plaintiff exhibited no evidence of a significant mental impairment. *R. at 274.*

[20/] Dr. Warren L. Smith conducted a psychological evaluation of Plaintiff on March 8, 1988. Dr. Smith concluded that Plaintiff can "read, write and calculate. He can understand simple job instructions and carry them out. He can sustain work performance if it were in his physical capabilities." *R. at 480.*

[21/] Dr. Passmore completed the form for Plaintiff on March 22, 1988. *R. at 484-85.* Plaintiff was rated as "unlimited/very good" for: following work rules, relating to co-workers, using judgment, interacting with supervisors, functioning independently, maintaining attention/concentration, understanding, remembering and carrying out complex, detailed, and simple job instructions, and behaving in a normal manner. *R. at 484-85.* Plaintiff was rated as "good" in: dealing with the public, relating predictably in social situations, and demonstrating reliability. *R. at 484-85.* Dr. Passmore rated Plaintiff as "fair" in two categories: ability to deal with work stresses, and personal appearance. *R. at 484-85.*

In Cruse v. United States Department of Health & Human Services, 49 F.3d 614 (10th Cir. 1995), the Tenth Circuit Court of Appeals analyzed mental impairments, the listings, degrees of limitation, and the mental assessment form (which was completed by Dr. Passmore). The Cruce court noted that the Mental

(continued...)

Plaintiff's mental impairment did not significantly impair the performance of "light work" activity.[22/]

One consequence of Plaintiff's mental impairment is Plaintiff's pain. On December 30, 1985, Plaintiff was diagnosed with somatoform reaction by Dr. Ronald C. Passmore. Dr. Passmore concluded that Plaintiff showed some evidence of psychogenic pain disorder. *R. at 342-43.* Dr. Passmore again examined Plaintiff in 1988, and testified at Plaintiff's third hearing. His diagnosis was somatoform disorder with evidence of psychogenic pain. *R. at 604-05.* Dr. Passmore testified that one

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[21/](...continued)
Assessment form does not directly correlate to the four areas in the Listings (i.e. restrictions of daily living, difficulty in maintaining social functioning, deficiencies of concentration, and episodes of deterioration). Id. at 618. The Court concluded that a description of "fair" on the form (which was defined as "ability to function in this area is seriously limited but not precluded") is equivalent to the listing definition of "marked." Id. at 618.

In this case, Plaintiff was rated as "fair," or marked, in only two of the fifteen "categories" on the Mental Assessment form. *R. at 484-85.* In addition, Dr. Passmore noted that one of those categories (maintaining personal appearance) was merely a by-product of Plaintiff's lack of money. *R. at 613.* A correlation of the categories in which Plaintiff was rated "very good/unlimited" and "good" to the four categories considered "essential for the performance of work" supports the ALJ's conclusion that Plaintiff's ability to perform work is not compromised by his mental impairment. None of the ratings by Dr. Passmore suggest Plaintiff's mental impairment would "restrict his daily living." Dr. Passmore's ratings of very good or good for following work rules, relating to co-workers, using judgment, interacting with supervisors, functioning independently, maintaining attention/concentration, behaving in a normal manner, dealing with the public, relating predictably in social situations, and demonstrating reliability indicate that Plaintiff's mental impairment would not result in any "difficulty maintaining social functioning." And Dr. Passmore's rankings of good/very good for remembering and carrying out complex, detailed, and simple job instructions, maintaining attention/concentration, and demonstrating reliability, indicate that Plaintiff's mental impairment would not restrict his concentration. Finally, Dr. Passmore's rating of very good/good for interacting with supervisors, and relating to co-workers suggests Plaintiff's mental impairment would not result in "episodes of deterioration."

[22/] The ALJ rated Plaintiff's functional limitation with respect to "restriction of activities of daily living" as "slight," and "deficiencies of concentration" as "never." Both rankings are presumed "not severe." See 20 C.F.R. § 1520a(c)(1). The ALJ rated Plaintiff as having "once/twice" experienced an episode of deterioration. (This rating is due to Plaintiff's single encounter with the boss that hit and struck Plaintiff in May of 1984.) The ALJ rated Plaintiff as "moderate" with respect to "maintaining social functioning." The last two ratings take Plaintiff out of the presumed not severe category. However, based on the record (including a doctor's assessment of all of Plaintiff's limitations as "none," a doctor's assessment that Plaintiff's ability to work was not hampered by his mental impairment, and a doctor's assessment of "good/very good" in thirteen of fifteen categories *r. at 271, 479-480,484-85*), the ALJ's determination that Plaintiff's impairment did not significantly effect his work ability is supported by substantial evidence.

result of Plaintiff's mental disorder is Plaintiff's belief that the pain he is experiencing is real. *R. at 614.*

However, the mere presence of pain does not equate to a finding of disability. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("[D]isability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."), citing Brown v. Bowen, 801 F.2d 361 (10th Cir. 1986). In this case, the ALJ conducted a complete Luna[23/] analysis. The ALJ determined, based on numerous factors,[24/] that Plaintiff's complaints of pain were not disabling. *R. at 561-562.* The ALJ's finding that Plaintiff's ability to engage in "light work" is not compromised by pain is supported by substantial evidence.

Vocational Expert/Grids

Plaintiff additionally argues that because the Plaintiff had nonexertional impairments, the ALJ erred by applying the Grids rather than relying upon the testimony of a vocational expert to assess Plaintiff's ability to perform work in the national economy. However, "the mere presence of a nonexertional impairment does not automatically preclude reliance on the grids. The presence of nonexertional impairments precludes reliance on the grids only to the extent that such impairments

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[23/] Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

[24/] The ALJ lists, among other things, Plaintiff's various physical activities, the lack of evidence of functional restrictions, the lack of the use of assistive devices, Plaintiff's lack of premature aging, weight loss, or disuse or atrophy of the muscles, and Plaintiff's testimony that his pain was (to some extent) controlled by medications. *R. at 561-62.* We discount the ALJ's reliance on the lack of medical records indicating the use of "magnetic resonance imaging, myelography, electromyographic studies, or other noninvasive or invasive studies," *(r. at 562)* because Plaintiff's complaints of pain are psychogenic in origin.

limit the range of jobs available to the claimant." Gossett v. Bowen, 862 F.2d 802, 807-08 (10th Cir. 1988). See also Ray v. Bowen, 865 F.2d 222 (10th Cir. 1989) ("[T]he ALJ's finding that Miss Ray suffered from no nonexertional impairment severe enough to limit the range of jobs available to her, and his consequent reliance on the grids, was supported by substantial evidence.").

In this case, the ALJ concluded that Plaintiff's ability to engage in light work was not "significantly compromised by his psychogenic pain disorder," and found that the Plaintiff had the RFC to engage in a full range of light work. *R. at 567.* Although the ALJ's ratings of Plaintiff's degree of limitation do not automatically place Plaintiff in the presumed "not severe" category (see *supra*, n.22.), substantial evidence does support the ALJ's finding that Plaintiff's nonexertional mental impairment did not compromise his ability to perform light work, and that Plaintiff could perform a full range of light activities.[25/] Consequently the ALJ's reliance on the grids was not error.

Accordingly, this case is **AFFIRMED.**

Dated this 16 day of August 1995.

Sam A. Joyner
United States Magistrate Judge

[25/] Dr. Smith concluded that Plaintiff's ability to engage in work was not limited by his mental impairment. *R. at 479-80.* Dr. Passmore rated Plaintiff's abilities as "unlimited/very good" and "good" in all but two of fifteen categories on the Mental Assessment of Ability to do Work-Related Activities (Mental) form. *R. at 484-85.* And, at least one psychiatric evaluation rated Plaintiff's impairment, in each of the categories essential to the performance of work as "none." *R. at 271.* See also *supra*, pp. 16-19.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WARREN C. CHAPPELL,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 94-C-9-W

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 8, 1995.

Dated this 15th day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STACEY STRICKLAND and DAWNA MCDONALD, Plaintiffs,	)	
vs.	)	Case No. 95-C-397K
PIPING COMPANIES, INC., Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of Plaintiffs' causes of action in this case against Defendant, Piping Companies, Inc..

DATED this 14th day of August, 1995.

Stacey Strickland, an individual,
Plaintiff

Dawna McDonald, an individual,
Plaintiff

Ralph Simon
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Attorney for Plaintiffs,
Stacey Strickland and Dawna McDonald

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: Kathy R Neal

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Attorneys for Defendant,
Piping Companies, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY PATRICK, An Individual,	)	
	)	
PLAINTIFF,	)	
	)	
-vs-	)	CASE NO. 93-C-585-K
	)	
STATE FARM FIRE AND CASUALTY COMPANY, a foreign corporation,	)	
	)	
DEFENDANT.	)	

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Come now the parties, plaintiff Larry Patrick and defendant State Farm Fire and Casualty Company, and pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, hereby stipulate to dismiss the above-entitled action and any and all causes of action arising therefrom without prejudice, with each party to bear their respective costs and attorneys fees.

Respectfully submitted,

RICHARDSON & STOOPS

By: _____
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Attorneys for Plaintiff, Larry Patrick.

SELMAN AND STAUFFER, INC.

By: _____

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Attorneys for Defendant, State Farm Fire and Casualty Company.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THIRTEEN COLT, M-203, 40 MM GRENADE LAUNCHERS, THREE MACHINE GUNS, AND THREE FIREARMS SILENCERS,

Defendants.

Case No. 91-C-861-C

ENTERED ON DOCKET
DATE AUG 17 1995

ORDER

Before the Court is government's motion to strike the claim filed by William Fleming. Claimant Fleming was convicted on May 1, 1992, in a parallel criminal proceeding, United States v. William Hugh Fleming, Case No. 91-CR-168-E for violation of 18 U.S.C. §§ 371, and 26 U.S.C. §§ 5861(1). Simultaneous with the criminal proceeding against Fleming, government commenced this parallel in rem civil forfeiture action against the subject firearms. Seizure and forfeiture of the firearms are authorized pursuant to 18 U.S.C. § 924(d) and 26 U.S.C. § 5872(a) since the firearms were involved in the commission of criminal offenses under Title 18 and Title 26. Similarly, under the provisions of 26 U.S.C. § 7302, any property used in connection with a violation of the internal revenue laws is subject to forfeiture.

During the pendency of claimant Fleming's criminal proceedings, on December 3, 1991, Fleming filed a claim in this civil proceeding asserting sole legal and equitable ownership of the subject 40 MM grenade launchers. Subsequent to filing his claim Fleming was convicted of two counts of conspiracy (18 U.S.C. § 371) to violate the transfer of tax provisions of the National Firearms Act, and one count of making false statements on required forms in order to avoid

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paying applicable transfer taxes (26 U.S.C. § 5861(l)). From these felony convictions Fleming was sentenced to a term of forty-six months imprisonment.

In its motion to strike Fleming's claim, government asserts, among other things, that Fleming had entered into an agreement with government that he would voluntarily forfeit his interest in the 40 MM grenade launchers if his criminal conviction was affirmed on appeal. On March 23, 1994, Fleming's conviction was affirmed by the Tenth Circuit in United States v. William Fleming, 19 F.3d 1325 (10th Cir. 1994). After several of government's unsuccessful efforts to obtain Fleming's signature on the stipulation of forfeiture, counsel for Fleming contacted government and advised that Fleming would execute a stipulation for forfeiture on the condition that the government return a M-16 rifle which was attached to one of the grenade launchers. On April 5, 1995, government satisfied this condition by returning to Fleming the M-16 rife. Government advises the Court that to date Fleming has continued to refuse to execute the bargained for stipulation and requests the Court to enforce the parties' agreement.

The Court notes that Fleming has failed to respond to government's June 1, 1994 motion to strike and enforce the parties' agreement. The time for responding to government's motion has passed. Under Local Rule 7.1C, the Court deems Fleming's failure to respond as a confession of the matters raised in government's motion.

The Court has the power to summarily enforce a settlement agreement entered into by litigants while the litigation is pending before it. See, United States v. Hardage, 982 F.2d 1491, 1496 (10th Cir.1993). In that claimant Fleming has failed to contradict any matters asserted by the government in its motion, the Court finds no need to conduct an evidentiary hearing on government's request to enforce the settlement agreement.

Accordingly, it is the order of the Court that government's request to strike Fleming's claim of ownership by enforcement of the parties' settlement agreement is hereby GRANTED.

IT IS SO ORDERED this 16th day of August, 1995.

H. DALE COOK
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 16 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLA

CHERYL E. LIMERICK,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 92-C-857-J

ENTERED ON DOCKET

DATE AUG 17 1995

ORDER REMANDING CASE TO ALJ

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit [Appeal 20-1, Order and Judgment 23-1], the above-referenced matter is **REMANDED** to the appropriate Administrative Law Judge for further proceedings consistent with the Court of Appeals' Order and Judgment entered on July 27, 1995.

It is so ordered this 16 day of AUGUST, 1995.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for the Defendant in this action.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLOVER GALLIMORE,

Plaintiff,

v.

AMERADA HESS CORPORATION,

Defendant.

Case No. 94-C-1115K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 9 day of ~~July~~ August, 1995.

Respectfully submitted,

By: _____

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By: _____

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ATTORNEYS FOR DEFENDANT

DKM-3714

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROGER E. SPEARS,

Plaintiff,

v.

BEAR AUTOMOTIVE SERVICE EQUIPMENT COMPANY, a Delaware corporation, and SPX CORPORATION, a Delaware corporation,

Defendants.

Case No. 94-1061-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Roger E. Spears, and the Defendants, Bear Automotive Service Equipment Company and SPX Corporation, jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear his or its own costs, attorneys' fees and expenses.

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- and -

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ATTORNEYS FOR DEFENDANTS, BEAR AUTOMOTIVE SERVICE EQUIPMENT COMPANY AND SPX CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRISTOL RESOURCES CORPORATION, an Oklahoma corporation,

Plaintiff,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation,

Defendant.

Case No. 94-C-1117-K

ORDER MODIFYING
ORDER ADDING PARTIES PLAINTIFF

Bristol Resource Corporation, the above-named plaintiff, having moved the Court for an order modifying the Order Adding Parties Plaintiff entered and filed herein on August 1, 1995, and it appearing to the Court that only Comstock should be joined in this action as a party plaintiff under Fed. R. Civ. P. 19(a); therefore,

IT IS ORDERED that the Order Adding Parties Plaintiff entered and filed herein on August 1, 1995, is hereby modified to join only Comstock as an additional party plaintiff in this action and that the caption of the action be amended appropriately.

IT IS FURTHER ORDERED that Bristol file an amended complaint consistent with this order within ten (10) days after entry of this order and that copies of the amended complaint together with copies

of the summons and copies of this order be served on Comstock within twenty (20) days from the entry of this order.

ENTERED this 15 day of August 1995.

TERRY C. KERN

UNITED STATES DISTRICT JUDGE

Prepared by:

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ATTORNEYS FOR PLAINTIFF,
BRISTOL RESOURCES CORPORATION

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION, as Receiver for SOONER FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

JERRY L. HUNT and MARY J. HUNT,

Defendants.

No. 93-C-1092-K

O R D E R

Counsel for plaintiff filed a dismissal without prejudice in this action on June 29, 1994. No objection has been filed by the defendants and no further action has been taken.

It is the Order of the Court that this action is hereby dismissed without prejudice.

ORDERED this 15 day of August, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GREGORY S. GOMEZ,

Plaintiff,

vs.

No. 93-C-1080-K

JOHN DOE, et al.,

Defendants.

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 15 day of August, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JANICE K. THRONEBERRY,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No. 93-C-674-B (W)

ENTERED ON DOCKET
DATE AUG 16 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fifth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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evaluation process.[2] He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of sedentary work, except for lifting more than ten pounds, standing/walking, off and on, for more than two hours in an eight-hour workday, and working in stressful environments. The ALJ also found that the plaintiff's pain and fatigue do not affect her ability to concentrate or prevent the performance of basic work-related activities. He concluded that the plaintiff is unable to perform her past relevant work as a purchasing and office manager, administrative assistant, and corporate caller.

The ALJ determined that the plaintiff is 46 years old, which is defined as a younger individual, has a high school education, and does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work. He found that although the plaintiff's nonexertional limitations do not allow her to perform the full range of sedentary work, there are a significant number of jobs in the national economy which she could perform, including the position of receptionist. The ALJ concluded that considering the plaintiff's age, education, work experience, exertional capacity and nonexertional limitations, she was not disabled under the Social Security Act at any time through the date of the decision.

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[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ's decision that the plaintiff is not disabled is not supported by substantial evidence.

(2) That the ALJ's decision that the plaintiff does not meet or equal the listings in Appendix 1 is not supported by the medical evidence which shows elevated sedimentation rates and muscle tenderness, tightness, and inflammation.

(3) That the ALJ failed to give proper weight to the treating physician's diagnosis.

(4) That the ALJ erred in applying the factors for disabling pain as set forth in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

(5) That the ALJ did not properly evaluate the severity of the plaintiff's mental impairment.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Plaintiff's first assertion is that the ALJ's decision is not supported by substantial evidence. Plaintiff complains that the ALJ's conclusions are erroneous and that he ignored objective evidence in reaching the conclusion that the plaintiff is not disabled.

The evidence in the record reveals that plaintiff has been diagnosed as having a possible undifferentiated connective tissue disorder and fibromyalgia[3] (TR 14, 254). Plaintiff alleges that these conditions have taken the form of chronic fatigue (TR 42, 54),

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[3]Fibromyalgia has been described as follows:

> A cardinal feature of fibromyalgia is the presence of pain, stiffness, and fatigue. Although the pain is often described by patients as being "all over," it is most prominent in the proximal muscle groups, ie, neck, shoulders, elbows, hips, knees, and back. The generalized stiffness of fibromyalgia does not diminish with activity, unlike the stiffness of rheumatoid arthritis, which lessens as the day progresses.

Dennis W. Boulware, MD et al., "The Fibromyalgia Syndrome," Postgraduate Medicine, Feb. 1, 1990, at 211. (TR 113).

allowing her to sit only for short periods (TR 48, 54) and stand 10 to 15 minutes at a time (TR 53). Plaintiff alleges that this condition has given rise to an affective disorder in the form of depression (TR 165), mood swings (TR 53, 164) and antisocial behavior (TR 58-59, 164).

The medical evidence establishes that the plaintiff was initially treated at the Springer Medical Clinic in Tulsa, Oklahoma in June of 1989 (TR 213). At this time, she complained of a recurring urinary tract infection and a back and neck ache that was "not chronic but noticeable" (TR 213).

In January of 1990, plaintiff was seen by Dr. Sara L. Newell, a rheumatologist at the Springer Clinic (TR 254). She at this time was treated for "generalized joint and muscle pain, recurrent mouth sores, and fatigue [that had been] progressive since approximately 1988" (TR 254). Plaintiff's ANA and rheumatoid factor were found to be unremarkable (TR 254). Dr. Newell diagnosed the plaintiff as having a undifferentiated connective tissue disorder (a form of arthritis) and fibromyalgia (TR 255). Non-steroidal, anti-inflammatory medication, as well as treatment with prednisone and plaquenil were all tried, without benefiting Plaintiff (TR 254).

The plaintiff was last seen by Dr. Newell in April of 1991 (TR 254). At that time, plaintiff's condition was unchanged in that she still had complaints of back and neck discomfort, headaches, and fatigue (TR 254). Dr. Newell noted that the plaintiff's medications included anti-depressants and pain medications (TR 254). Her erythrocyte sedimentation rate ("ESR") was also measured at 34, a rate that Dr. Newell characterized as "slightly elevated" (TR 254). An examination at this time revealed "spasm of both

trapezius muscles and tenderness of her posterior neck associated with tenderness of both knees" (TR 254). Dr. Newell stated that in her opinion "there is no further treatment to offer this lady who continues to have her symptom complex" (TR 255). The doctor concluded that plaintiff was totally disabled at the time, with a high probability that she had a chronic condition "that will keep her disabled for years." (TR 255).

On January 30, 1992, Chiropractor J.E. Halsey of the Halsey Chiropractic Clinic wrote a "to whom it may concern" letter to the Department of Health and Human Services in Tulsa, and summarily stated that he was currently treating the plaintiff for: "[p]olymyositis[4] of the sternocleidomastoideous[5], trapezius, paravertebrals and cervical plexus[6] syndrome. C1-C2 radicualgia[7] with soft tissue enthesopathies[8] with thoracicalgia[9] and occipital cephalgia.[10]" (TR 257)[11]. He concluded that she was temporarily disabled.

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[4]Defined in the 17th Edition of Taber's Cyclopedic Medical Dictionary as "a rare, inflammatory disease of skeletal muscle tissue characterized by symmetric weakness of proximal muscles of the limbs, neck, and pharynx".

[5]According to the 17th Edition of Taber's Cyclopedic Medical Dictionary, the term "sternocleidomastoid" refers to one of two muscles arising from the sternum and inner part of the clavicle. The term actually used is not defined.

[6]The 17th Edition of Taber's Cyclopedic Medical Dictionary defines "cervical plexus" as a "plexus [network of nerves] formed by loops joining the anterior rami [branches] of the first four cervical nerves. It receives communicating rami from the sympathetic ganglia [nervous tissue supplying involuntary muscles]".

[7]The 17th Edition of Taber's Cyclopedic Medical Dictionary does not define "radicualgia". It does define "radiculalgia" as "Neuralgia [severe sharp pain] of roots of nerves".

[8]The 17th Edition of Taber's Cyclopedic Medical Dictionary does not define this term. However, "enthesitis" is defined as "tenderness to palpation at the site of attachment of bone to a tendon, ligament, or joint capsule".

[9]The 17th Edition of Taber's Cyclopedic Medical Dictionary does not define "thoracicalgia". The chiropractor probably meant to refer to "thoracalgia" which means "pain in the chest wall".

[10]Again, the chiropractor uses a term that is undefined in the 17th (latest) Edition of Taber's Cyclopedic Dictionary. He probably meant to refer to "cephalalgia"--a headache.

[11]One wonders who the chiropractor was trying to impress with all this jargon. His use, in a single short paragraph, of multiple [mostly inaccurate] technical references is simply dreadful. All it really says is that Plaintiff was being "treated" for neck, shoulder, and chest pain, and headaches. The chiropractor's letter was directed to the Department of Health and Human Services Office of Hearings

(TR 257).

On February 20, 1991, the plaintiff underwent a consultative physical examination by Dr. Carolyn J. Steele (TR 156-157). Dr. Steele found the plaintiff's chief complaints to be fibromyalgia and depression (TR 156). Dr. Steele noted that the plaintiff had been tested for lupus and rheumatoid arthritis, but both tests were negative (TR 156). During the physical examination, Dr. Steele found the plaintiff to be "a well-developed, well-nourished female who was alert and cooperative and well-oriented" (TR 157). Dr. Steele went on to note:

> EXTREMITIES: Were negative for edema or varicosities. She had good pulses in the upper and lower extremities. None of her joints were hot, red or swollen. She complained of pain with palpation across her wrists and feet. She had good range of motion of all of her joints and none of her joints revealed crepitance with range of motion.
>
> MUSCULOSKELETAL: She had good range of motion of her lumbar and thoracic spine, slightly decreased motion in the cervical spine. The trapezia was tender bilaterally as well as the paraspinal muscles throughout the cervical, thoracic and lumbar area to palpation. I felt some ropiness and some muscle spasms in the trapezius and in the paraspinal muscles. Straight leg raising was negative. Her gait was stable. She was able to heel-toe walk without any difficulty.

(TR 157). Dr. Steele's assessment of the plaintiff noted a history of fibromyalgia disease and an anxiety-depression disorder (TR 157).

In February of 1991, plaintiff underwent a consultative psychiatric evaluation by Dr. Ronald C. Passmore (TR 164). Dr. Passmore found the plaintiff to be a "middle-aged white lady who looks much younger than 45" (TR 165). He found that the plaintiff "moved

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and Appeals, ostensibly to assist in their understanding of Plaintiff's condition. However, it could not have done anything but further obscure the matter. Besides being incomprehensible, it contains no recitation of history, no findings upon examination, no explanation of the course of "treatment", no analysis of etiology, and no real prognosis. Given the utter lack of substance in this "report", the ALJ was entirely justified in discounting the chiropractor's summary conclusion that Plaintiff was "in a temporary total state of disability".

alertly into the office" (TR 165) and tended "to be a little hyperactive, and she talks fast" (TR 165). "She does not show looseness of association, flight of ideas, hallucinations, or delusions" (TR 165). Dr. Passmore's impressions as to Axis I were:

> The patient shows an affective disorder, primarily depression, but she is having mood swings and apparently is having some periods that she calls 'highs', although, it is not a clear-cut panic episode, and these mood swings occur very quickly and suddenly. I reviewed her medicines with her, and I told her she needed some adjustment of the medicine to try and control the mood swings and that she should talk to her doctor when [he] gets back. She has improved since I saw her in November. (TR 165).

As to Axis II, Dr. Passmore made no diagnosis (TR 166). As to Axis III, Dr. Passmore noted that the plaintiff stated that she had been told she has fibromyalgia, but is no longer taking prednisone for treatment (TR 166). She described the aches as coming and going and moving around (TR 166). In Axis IV, Dr. Passmore assessed her stressors as "mild to moderate" (TR 166). Dr. Passmore found her primary stressor to be financial, although in Axis V he determined she was capable of handling her own funds (TR 166). Dr. Passmore described her adjustment as fair to poor (TR 166).

Dr. Passmore saw the plaintiff from February through October of 1991 (TR 243-245). Dr. Passmore's most recent progress notes indicate that her primary problems appeared to be related to her divorce, children, and "bullshit in family" (TR 243). The notes also indicate that the plaintiff was feeling better after taking Wellbutrin (TR 243). Treatment by Dr. Passmore was discontinued when the plaintiff's insurance was canceled (TR 62, 243).

The medical evidence reveals that the plaintiff has been treated by Michael Merril, of Family and Children's Service, Inc. (TR 46, 250). The focus of these treatments was

psychological stress reduction to reduce the incidence or severity of her symptoms (TR 250).

There is substantial evidence in the record to support the decision of the ALJ that the plaintiff, while precluded from doing past relevant work, is not disabled, as her impairments do not prevent her from doing sedentary work available in the national economy. The ALJ noted that during the consultative examination the plaintiff exhibited a good range of motion in the lumbar and thoracic spine and only a slightly decreased range of motion in the cervical spine (TR 19, 157). He also noted that she had a good range of motion in all joints and that no heat, redness, or swelling was present during the examination (TR 19, 157). The ALJ noted that Dr. Newell's laboratory results for the plaintiff had shown an "unremarkable" ANA and rheumatoid factor (TR 19, 254). The ALJ found no evidence of muscle atrophy or weakness in the extremities in the medical record (TR 19). The ALJ also noted that the plaintiff's gait was stable and she was able to walk heel-to-toe without difficulty (TR 19, 157). The ALJ noted that the objective medical evidence failed to support the plaintiff's testimony regarding difficulty with her hands (TR 19, 55). The ALJ stated that he could not find any other physical evidence of any other physical problem, including complaints of vision problems that would preclude sedentary work activity (TR 19).

Plaintiff's second assertion is that the ALJ's decision that the plaintiff does not meet or equal the listings in Appendix 1 is not supported by the medical evidence (Plaintiff's Brief, pg. 2). In support, the plaintiff cites the ESR tests which the ALJ characterized as "infrequently to occasionally elevated" (TR 19), which she points out were above the

normal range eleven of the thirteen times that the tests were run.

A finding of inflammatory arthritis is a two-part test, according to Social Security regulations. There must be a history of "persistent joint pain, swelling, and tenderness involving multiple major joints . . . with signs of joint inflammation (swelling or tenderness) on a current physical examination," accompanied by a test to corroborate the diagnosis. 20 C.F.R. § 404, Subpt. P, App. 1. An elevated ESR is corroborating evidence for a diagnosis. 20 C.F.R. § 404, Subpt. P, App. 1, § 1.02(B)(3). But plaintiff fails to direct the court to a current physical examination that would satisfy the first part of the test. As discussed, Dr. Newell found plaintiff's ANA and rheumatoid factor to be unremarkable (TR 254) and Dr. Steele noted that "[n]one of her joints were hot, red or swollen" (TR 157). Without such evidence, an elevated ESR does not support a finding that the plaintiff is disabled.

Plaintiff's third assertion is that the ALJ failed to give proper weight to the treating physician's opinion that the plaintiff is totally disabled. The treating physician rule requires the ALJ to give substantial weight to the opinions of the plaintiff's treating physician. If the ALJ disregards the opinions of the treating physicians, specific legitimate reasons must be given for such a finding. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). "However, a treating physician's report may be rejected if it is brief, conclusory and unsupported by medical evidence." Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988).

In this case, reports were submitted by Plaintiff's treating physician, Dr. Newell and by Chiropractor Halsey (TR 254, 257). Both concluded that the plaintiff was totally disabled, although they were inconsistent insofar as the chiropractor characterized the

disability as "temporary" while the physician viewed Plaintiff's condition as "chronic" and probably long term (TR 255, 257). These conclusions were contradicted by the reports of the consultative physicians, Dr. Steele and Dr. Passmore, which are significant in their lack of any limitations placed upon the plaintiff (TR 156, 164).

The ALJ in considering Dr. Newell's conclusion that the plaintiff is "totally disabled" (TR 255) noted that she had presented "no laboratory [or] physical evidence to substantiate her medical opinion . . . ." (TR 21).[12] The ALJ found that the objective evidence cited by Dr. Newell, "spasm of both trapezius muscles and tenderness of the posterior neck associated with tenderness of both knees" failed to support her conclusion (TR 21, 254). The ALJ also found that Dr. Newell's statements that plaintiff's chronic pain and fatigue limit her attention span and her ability to sit for long periods of time is not supported by substantial medical evidence (TR 21).

The plaintiff asserts that the ALJ ignored physical, objective medical evidence that the other doctors who treated the plaintiff and the consultative physician also found muscle tenderness, tightness or spasms in either the trapezius, neck or back muscles (Plaintiff's Brief, pg. 3). The plaintiff chronicles each of these findings in the record and argues that the "overwhelming consistency" of these findings support Dr. Newell's conclusions (Plaintiff's Brief, pgs. 4-5). Plaintiff mischaracterized the ALJ's findings and ignores other statements made by the ALJ. The plaintiff is correct that Dr. Martin, Dr. Steele, and Dr.

[12]The court notes that Dr. Newell did rely on the elevated ESR's in reaching her conclusion that Plaintiff was totally disabled, reciting a sedimentation rate of 53 in September of 1989, and a significantly decreased (i.e. improved), but still "slightly elevated" sedimentation rate of 34 when Plaintiff was last seen in April of 1991. However, the nature of these test results render them inconclusive on the ultimate issue of disability, and although they can be interpreted as supporting Dr. Newell's conclusion, they do not give it the conclusive support that laboratory tests often provide.

Newell found evidence of these ailments (TR 157, 197, 254). The ALJ never questioned the existence of these ailments on any occasion. The ALJ did find "these objective findings unpersuasive that the claimant is totally disabled" (TR 21) and that "there is no indication that these problems would exertionally preclude sedentary work" (TR 19). The ALJ properly considered the treating physician's opinion as to the ultimate issue of total disability, and chose to disregard it after specifically stating reasons for doing so.[13]

The ALJ, finding Chiropractor Halsey's conclusions to be unsupported by the medical evidence (TR 21), did not err in discounting his summary conclusion. While a plaintiff may submit chiropractic evidence to help the Secretary understand her inability to work, chiropractors are not considered an acceptable medical source. Bunnell v. Sullivan, 912 F.2d 1149, 1152 (9th Cir. 1990) (citing 20 C.F.R. § 404.1513 (1989)). "[T]here is no requirement that the Secretary accept or specifically refute such evidence." Id. at 1152. In the instant case, the ALJ noted that Dr. Halsey did not present any laboratory or physical evidence to substantiate his conclusion that the plaintiff is in a "temporary state of total disability" (TR 21, 257).

The plaintiff's last assertion is that the ALJ erred in applying the factors for disabling

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[13]Based on Plaintiff's ESRs, there is little doubt but that she suffers from some degree of fibromyalgia and/or undifferentiated connective tissue disorder. However, differing conclusions can be legitimately drawn from the record over whether Plaintiff suffers from pain and fatigue severe enough to be totally debilitating. Since the objective evidence with regard to exertional limitation does not in itself mandate a finding of disability, the ultimate question turns on the degree of pain and fatigue that can be credibly established. These nonexertional elements are not subject to objective measurement, and it is apparent that plaintiff's treating physician based her conclusion heavily upon the persistent subjective complaints of the Plaintiff herself. This would be the natural course for a physician focused on treating and curing a patient's professed ills. It is also natural that a treating physician who is accustomed to simply accepting the history given by a patient seeking care, will continue to help by recognizing a "total" disability once all medical remedies have failed to bring satisfactory subjective relief.

However, determining credibility is a judicial, not a medical function, and this is especially true where, as here, the opinion expressed by the treating physician is uninformed of the legal standards to be applied, and not compelled by objective medical evidence. The ALJ acknowledged what little the Plaintiff's treating physician was able to find objectively, and had the opportunity to observe and question the Plaintiff. He then focused squarely on her credibility, and ultimately did not believe that her subjective, non-exertional symptoms were as severe as she described. Under these circumstances, this court is loathe to second-guess the ALJ's credibility determination.

pain as set forth in Luna v. Bowen, 834 F.2d at 165-66. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the

impairment and the pain alleged. Luna, 834 F.2d at 164. "'[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.'" Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had pain-producing conditions, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

Plaintiff's complaints of disabling pain are not consistent with the record as a whole. The ALJ discussed the reports of the treating and consultative physicians and said: "the laboratory and physical findings are inconsistent with a severe, disabling condition of pain and fatigue" (TR 20). The ALJ found significant that the plaintiff can perform daily activities, including laundry, housework, and grocery shopping and has no significant problem getting along with her family and others when she does not have a flare-up (TR 20).

The ALJ noted that, while the plaintiff testified that her condition interferes with her ability to concentrate (TR 20, 57, 99), she regularly watches television or listens to the

radio two hours a night and reads short articles, newspapers, and Reader's Digest (TR 20, 44). He also noted that the plaintiff has failed to implement an exercise program recommended by her physician (TR 20). He found that the medical record failed to support complaints of severe side effects of her medication and that she reported no problems with her medication to the treating physicians (TR 20, 50, 254).

Plaintiff complains that the ALJ, noting that the plaintiff manifested none of the physical changes associated with severe intractable pain, improperly required the plaintiff to demonstrate these changes. (Plaintiff's Brief, page 5). It was not an error for the ALJ to consider evidence of these physical changes while making a credibility determination of the plaintiff's allegations of disabling pain.

Plaintiff's last assertion is that the ALJ did not properly evaluate the severity of plaintiff's mental impairment (Plaintiff's Brief, pg. 9). The ALJ did find that she suffered from depression, which he characterized as resulting in

> "moderate" restrictions of activities of daily living; "slight" difficulties in maintaining social functioning; "often" deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner; and "once or twice" episodes of deterioration or decompensation in work or work-like settings which cause an individual to withdraw from that situation or to experience exacerbation of signs and symptoms.

(TR 23).

Plaintiff complains that the ALJ, in arriving at this determination, relied on statements she made concerning the effect her physical problems have on her daily activities (Plaintiff's Brief, pg. 9). The plaintiff mischaracterizes the ALJ's conclusions concerning her allegations of disabling pain. The ALJ did not completely discount the plaintiff's allegations of pain, but only found that they did not support a finding of

disability (TR 20). It was not an error for the ALJ to rely on these statements while evaluating the plaintiff's mental impairment.

The Secretary's decision that the plaintiff was not disabled is supported by substantial evidence and is a correct application of the pertinent regulations. The decision is affirmed.

Dated this 14th day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: Throne.or

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEA D. WILSON,

Plaintiff,

v.

AMERICAN NATIONAL CAN COMPANY,

Defendants.

Case No. 95-C-242-H

ENTERED ON DOCKET
DATE AUG 16 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff Dea D. Wilson and Defendant American National Can Company, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, do herein stipulate that the above styled and numbered cause, and all claims asserted therein, be dismissed with prejudice to the refiling thereof.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
AMERICAN NATIONAL CAN COMPANY

PRR/MAC/PLD/4926/DISMISSAL

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOANN ALRED,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 95-C-305-H

ORDER

Upon consideration of the Federal Defendant's Motion to Substitute the United States as Defendant and Memorandum in Support Thereof, and for good cause shown, IT IS HEREBY ORDERED that the Defendant, Charles Arthur Rector, is granted dismissal from this case, and that the United States of America shall be substituted as Defendant in his stead.

S/ SVEN ERIK HOLMES

SVEN E. HOLMES
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

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United States Attorney

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JANICE K. THRONEBERRY,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 93-C-674-B(W)

ENTERED ON DOCKET

DATE AUG 16 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 15, 1995.

Dated this 15th day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN FRANCIS ROURKE,

Plaintiff,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants.

No. 94-C-454-B

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on defendants' motion to dismiss plaintiff's complaint. Following a review of the arguments and applicable legal authority, the Court concludes the motion should be granted for the reasons hereafter stated.

In May,1983, plaintiff was indicted in the United States District Court for the Northern District of Illinois for violations of Title 21 of the United States Code. As part of a plea agreement negotiated by plaintiff and his then-counsel, Tulsa attorney Paul Brunton, with the U.S. Attorney's office in Chicago, Illinois, the government agreed not to take any action with respect to plaintiff's airman and mechanic's certificates ("certificates"). In reliance on the plea agreement, plaintiff pleaded guilty to one violation of section 846 of Title 21 in May, 1984.

In January, 1986, the Federal Aviation Administration (FAA) sent plaintiff a "Notice of Proposed Certificate Action" pursuant to 49 U.S.C. §1429(c), in which the FAA purported to advise plaintiff of its intent to revoke plaintiff's certificates because

of plaintiff's guilty plea. However, the FAA notice allegedly was not sent to plaintiff at his prison address, but to his former counsel, Mr. Brunton, who was no longer representing plaintiff. On July 18, 1986, the FAA issued an Order of Revocation, revoking plaintiff's certificates. Plaintiff received a copy of the Order of Revocation on November 20, 1986. Plaintiff's copy of the Order allegedly did not provide any indication of the appeal procedures available to plaintiff to contest the Order. Plaintiff wrote to the FAA on November 20, 1986, explaining the terms of his plea agreement and requesting that the FAA rescind the Order of Revocation.

More than five years later, on May 8, 1992, plaintiff submitted what he terms a "formal request" to the FAA to rescind the Order of Revocation. The FAA responded on June 10, 1992 and refused to rescind the Order of Revocation and refused to comply with the terms of the plea agreement. Plaintiff then filed a petition for review of the FAA revocation with the National Transportation Safety Board (NTSB). The NTSB dismissed plaintiff's petition for lack of jurisdiction. Plaintiff then filed an appeal with the NTSB, which affirmed its decision.

Plaintiff filed this action on May 8, 1994. He seeks damages from the Administrator of the FAA and the Attorney General of the United States for the actions of their employees and agents in revoking his certificates in violation of the plea agreement he made with the U.S. Attorney's office in the Northern District of Illinois. Plaintiff bases jurisdiction under 28 U.S.C. §1331, in

claiming a constitutional deprivation of a property interest in his certificates, under the U.S. Supreme Court's decision in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

In their motion, defendants argue that plaintiff's complaint should be dismissed because the limitations period in which plaintiff may bring a Bivens action has already run. Defendants also argue that plaintiff's complaint is defective because plaintiff failed to allege an affirmative link between the named defendants and the revocation of his certificates.

A Bivens-type action, like a §1983 action, is subject to the statute of limitations of the state where the action arose. Wilson v. Garcia, 471 U.S. 261 (1985); Industrial Constructors v. Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994). In his complaint, plaintiff alleges that venue of this action is proper here because a "substantial part of the events giving rise to the claim occurred in this federal district and a substantial part of the property that is subject of the action is situated here." However, if the Court assumes plaintiff's cause of action arose in Oklahoma, Oklahoma's two-year statute of limitations will be applied to plaintiff's Bivens action. See Abbitt v. Franklin, 731 F.2d 661 (10th Cir. 1984); Okla. Stat. tit. 12, § 95. If Illinois, as the site of the plea agreement, is deemed to be the state where the plaintiff's claim arose, plaintiff likewise faces a two-year statute of limitations under that State's law. See Kalimara v. Illinois Dept. of Corrections, 879 F.2d 276, 277 (7th Cir. 1989); Ill. Ann. Stat. ch. 735, para. 5/13-202.

Plaintiff argues that his claim did not accrue until December 15, 1994, the date he was released from custody and thus able to exercise the rights and privileges under his certificates. The Court disagrees, finding that the statute of limitations began to run when the plaintiff learned or should have learned of the factual basis of his action. Industrial Constructors, 15 F.3d at 968-69. Whatever shortcomings in notice of the revocation were caused by the FAA, it is clear from plaintiff's complaint that in November, 1986, he was aware of the FAA's attempt to revoke his certificates. The Court notes that neither Oklahoma nor Illinois law provide a tolling period for incarcerated persons to bring actions in those two states. The Court thus finds that plaintiff was on notice of facts giving rise to his Bivens cause of action by the end of 1986, and should have filed this action within the next two years. Because plaintiff instead waited until May, 1994, to file this action, it is time-barred.

In addition to being time-barred, the Court also finds that plaintiff's complaint is defective in that plaintiff fails to establish an "affirmative link" between the named defendants and the revocation of plaintiff's certificates. The "affirmative link" requirement means that "before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made." Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976). In Kite, the Tenth Circuit held that, in a Bivens action, as well as in a §1983 action, a plaintiff may not recover

from agency administrators for actions of their employees, on a respondeat superior theory. Id. Plaintiff has not alleged that the FAA Administrator or the Attorney General themselves had any direct connection to the revocation of plaintiff's certificates. Plaintiff's complaint only alleges that the named defendants acted solely through their employees and/or agents. The Court finds that, even if plaintiff could show wrongdoing by defendants' employees or agents, the named defendants may not be held vicariously liable here for damages arising out of any such alleged wrongful acts of their employees or agents.

For the foregoing reasons, defendants' motion to dismiss (docket #17) is hereby **GRANTED.**

IT IS SO ORDERED this 15th day of August, 1995.

THOMAS R. BRETT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL INSURANCE COMPANY, Plaintiff, vs. TRI-STATE INSURANCE COMPANY, Defendant.	)	Case No. 93-C-715-B Consolidated with
CITATION OIL AND GAS CORPORATION, Plaintiff, vs. TRI-STATE INSURANCE COMPANY and HEALDTON TANK TRUCK SERVICE, INC., Defendants.	)	Case No. 94-C-697-B

JUDGMENT

Pursuant to a Settlement Agreement between Citation Oil and Gas Corporation and Healdton Tank Truck Services, Inc., judgment is granted in favor of Healdton and against Citation on Citation's claims against Healdton, subject to the following reservation:

> Citation's dismissal with prejudice against Healdton expressly reserves all rights of Citation as an additional insured under the Tri-State Policies, and/or with respect to Citation's right to indemnity from Healdton to the extent of Healdton's applicable insurance policies, including, but not limited to Tri-State, for all coverage available to Healdton for contractual obligations assumed by Healdton under the contract. It is expressly intended that Healdton's liability is limited to insurance proceeds, and Citation will not proceed against Healdton beyond the amount recoverable on Healdton's applicable insurance policies.

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Pursuant to said Settlement Agreement, judgment is entered in favor of Citation and against Healdton on all of Healdton's claims against Citation.

Costs are awarded to neither party and each party is to bear its own attorneys fees.

DATED this 16th day of August, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL INSURANCE COMPANY, Plaintiff, vs. TRI-STATE INSURANCE COMPANY, Defendant.	)	Case No. 93-C-715-B Consolidated with
CITATION OIL AND GAS CORPORATION, Plaintiff, vs. TRI-STATE INSURANCE COMPANY and HEALDTON TANK TRUCK SERVICE, INC., Defendants.	)	Case No. 94-C-697-B

ORDER

This matter comes on for consideration of numerous motions, as follows:

(1) Motion by Healdton Tank Truck Service, Inc. (Healdton) for Partial Summary Judgment (docket # 46) against Tri-State Insurance Company (Tri-State) on Healdton's liability claim against Tri-State for breach of insurance contract and bad faith. The Court will discuss and rule upon the issues *infra*.

(2) Motion by Citation Oil and Gas Corporation (Citation) for Partial Summary Judgment (docket # 47) on liability only for breach of contract against Tri-State and Healdton. The Court will discuss

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and rule upon this motion *infra* as it relates to Tri-State. The Court denies, as moot, this motion as it relates to Healdton in view of the stipulated settlement between Citation and Healdton (see docket # 56).

(3) Motion by Healdton for Summary Judgment (docket # 48) against Citation. This motion is denied as moot in view of the stipulated settlement between Citation and Healdton (see docket # 56).

(4) Citation's and Healdton's joint Application For Order of Dismissal With Prejudice Of Designated Claims (docket #56). Relative thereto the Court enters the following Order:

IT IS ORDERED that, pursuant to a Settlement Agreement between Citation Oil and Gas Corporation and Healdton Tank Truck Services, Inc., Citation has agreed to, and the Court herewith dismisses with prejudice, Citation's claims against Healdton, subject to the following reservation:

> Citation's dismissal with prejudice against Healdton expressly reserves all rights of Citation as an additional insured under the Tri-State Policies, and/or with respect to Citation's right to indemnity from Healdton to the extent of Healdton's applicable insurance policies, including, but not limited to Tri-State, for all coverage available to Healdton for contractual obligations assumed by Healdton under the contract. It is expressly intended that Healdton's liability is limited to insurance proceeds, and Citation will not proceed against Healdton beyond the amount recoverable on Healdton's applicable insurance policies.

Healdton has agreed to, and the Court herewith dismisses with prejudice, all of Healdton's claims against Citation. A final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure,

will be entered simultaneously herein.

(5) All demands for Jury Trial endorsed upon the parties various pleadings: The Court Orders that such Jury Demands are superseded by the parties agreement at the status conference held August 2, 1995, that the insurance coverage issues will be tried non-jury to the Court in the event motions for summary judgment do not dispose of same, and that any bad faith issues remaining after rulings upon the various motions will be tried to a jury.

(6) Tri-State's Motion To Realign The Parties And For New Scheduling Order (docket # 61). This Motion is DENIED as moot in view of the parties agreements as the status conference held August 2, 1995.

UNDISPUTED FACTS FROM
THE EARLIER LITIGATION,
FEDERAL INSURANCE COMPANY
VS.
TRI-STATE INSURANCE COMPANY
93-C-715-B

Federal Insurance Company (Federal) and Tri-State Insurance Company (Tri-State) stipulated to the following facts, with attached exhibits:

1. Federal is an insurance company incorporated in the state of Indiana, with its principal place of business in New Jersey. It is licensed to do business in the state of Oklahoma.

2. Tri-State is an Oklahoma corporation with its principal place of business in Oklahoma. It is licensed to do business in the state of Oklahoma.

3. Healdton is an Oklahoma corporation with its principal place of business in Healdton, Oklahoma.

4. Citation is a Texas corporation with its principal place of business in Houston, Texas.

5. Mike McElroy is a resident and citizen of the state of Oklahoma.

6. Complete diversity of citizenship exists between the Federal and Tri-State.

7. 93-C-715-B is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 for the purposes of determining a question of actual controversy between Federal and Tri-State and for recovery of money damages. The amount in controversy exceeds $50,000.00.

8. Tri-State issued an automobile liability policy to Healdton, policy number A005111, effective 3-1-91 to 3-1-92 with a one million dollar ($1,000,000.00) limit.

9. Tri-State issued a general liability insurance policy to Healdton, policy number G085436, effective 3-1-91 to 3-1-92 with a one million dollar ($1,000,000.00) limit.

10. Federal issued a general liability insurance policy to Citation, policy number 35171390, effective from 3-1-91 to 3-1-92 with a one million dollar ($1,000,000.00) limit.

11. Federal issued a commercial umbrella liability insurance policy to Citation, policy number 7966-2599, effective from 3-1-91 to 3-1-92 with a ten million dollar ($10,000,000.00) limit.

12. Citation and Healdton entered into a Master Service Contract on 10-13-90.

13. The Master Service Contract is to be governed, construed, and interpreted in accordance with the laws of the state of Texas.

14. Healdton provided tank cleaning services to Citation pursuant to the Master Service Contract.

15. The parties furnished the Court a true and correct copy of Chapter 127 of the Texas Civil Practices and Remedies Code as amended, which was in effect on October 16, 1991.

16. Healdton was called to clean out tanks and remove tank bottoms from Citation tanks in Healdton, Oklahoma, on October 16, 1991. A fire occurred which caused injury to Mike McElroy.

17. The storage tank where the fire/explosion occurred was used for gathering, storing, and transporting oil, salt water, and fresh water.

18. On July 24, 1992, Mike McElroy and his wife Terri McElroy filed suit against Citation, Case No. CIV-92-1369-W in the United States District Court for the Western District of Oklahoma.

19. The claim of McElroy against Citation was settled for the sum of $2,700,000.00.[1] Neither Federal nor Tri-State question the amount of the settlement.

THE RULING IN THE EARLIER CASE

Federal argued that the two Tri-State policies provided primary coverage to Citation for the claim of McElroy against Citation and further argued that its policies provided to Citation were excess coverage. Federal averred that when Tri-State refused to pay to settle the claim against Citation, Federal made the

[1] In the newly consolidated case 94-C-697-B various pleadings refer to the settlement as being $2.75 million, rather than 2 million, seven hundred thousand. The disparity is not of immediate moment.

payment and was entitled to subrogation against Tri-State for the amount of Tri-State's coverage.

Tri-State argued alternatively as to its general liability policy issued to Healdton: first, the policy did not insure against liability assumed by contract; and secondly, the indemnity provision of the Master Service Contract (the MSC) between Healdton and Citation was void and unenforceable because the Texas Well or Mine Service Indemnity Statutes applied, thereby negating such provision. Tri-State argued this latter issue, if resolved in its favor, will obviate resolution of the "liability assumed by contract" issue. Federal's position was that the Texas Well or Mine Service Indemnity Statutes, which generally prohibit indemnity agreements for certain specified oil well activities, did not apply to the McElroy claim and therefore did not allow Tri-State to escape responsibility for its coverage.

As to the Business Auto Policy issued to Healdton, Tri-State argued there was no coverage because the McElroy claim did not arise out of ownership, maintenance, or use of an auto. Tri-State's position was that McElroy's Complaint, filed in the Western District of Oklahoma against Citation, alleged the proximate causations of the injuring fire were the negligent acts of Citation without causative involvement of any Healdton vehicle. Tri-State attempted to validate this position by averring that "If Federal believed this was a business auto policy, they would have paid

under their business auto policy."[2] The Court rejected this argument out-of-hand because the record failed to establish that a Citation vehicle was involved in the injuring fire. The Court further rejected Tri-State's alternative offering that ". . . if there is coverage under Tri-State's business auto policy, there is also coverage under Federal's business auto policies", arguably putting the allegedly "excess" policies on equal footing which should therefore invite proration.

In the Federal/Tri-State Order the Court noted the lack of certain potentially critical but undeveloped facts such as the specific employment status of the injured party Mike McElroy. McElroy's deposition testimony revealed he was, at the time in question, a ten percent owner of Healdton. Federal injected into its Statement Of Undisputed Facts Based Upon Stipulation Of The Parties a characterization of McElroy as a "subcontractor" of Healdton's which the Court did not perceive as supported by the record. Further, the Court declined to treat same as an "undisputed fact", irrespective of Local Rule 56.1 (B) language to the contrary.

Tri-state also argued that its general liability policy does not insure against tort liability assumed by contract (which Healdton assumed by its service contract with Citation) unless the contract is an "insured contract"; that the "insured contract" clause requires the bodily injury happen to a "third person". The

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[2] Federal paid the 2.7 million settlement to the McElroys under its umbrella policy issued to Citation.

Court concluded a factual issue existed as to McElroy's legal status in relation to the Healdton-Citation service contract, which precluded summary judgment as to the "liability assumed by contract/insured contract" issue. This is because coverage under the Tri-State Comprehensive General Liability policy hinges upon the injured party being a "third party" which McElroy may or may not be, an issue more properly to be determined by the fact finder.

The Court examined the Texas anti-indemnity statutes as applicable or inapplicable to the Tri-State policies in issue.

Federal argued the Texas anti-indemnity statutes did not excuse Tri-State's refusal to pay for two reasons: (1) The statutes were not applicable because Citation Oil and Gas was a named insured and therefore comes under the exception provided in §127.005 Insurance Coverage; and (2) the statutes apply only to certain activities not including that being conducted by the Healdton subcontractor at the time of the accident nor to the physical facility at which the activity was being conducted. The Court concluded neither argument surmounted the unresolved factual conflict existing therein, one of which was whether Citation was a named insured under the Tri-State general liability policy. Since this factual issue has been resolved by Tri-State's eleventh hour admission that Citation is indeed a named insured under the general liability policy the Court now concludes the Texas anti-indemnity statutes do not excuse Tri-State's refusal to pay because Citation Oil and Gas was a named insured and therefore comes under the exception provided in §127.005 Insurance Coverage. This obviates

any further necessity to factually determine what are "oil well or mine services" and whether the site where the accident occurred was a "fixed facility" and whether the activity occurring that date was within the definition of "Well or Mine Service" set forth in the Texas statutes.

HEALDTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST TRI-STATE FOR BREACH OF CONTRACT AND BAD FAITH

Healdton sets forth 15 undisputed facts some of which overlap the Federal/Tri-State stipulated facts set forth above:[3]

1. Healdton and Citation entered into a Master Service Contract. Healdton agreed to add Citation as an additional insured under Healdton's general liability insurance policy which was required by the contract. Paragraph 6.3 of the Master Service Contract provides: "Contractor (Citation) shall be named as an additional insured in all such insurance policies . . . with all such insurance being primary to any insurance of Contractor that may apply to an [sic] such occurrence, accident or claim."

2. As of October 16, 1991 (the date of the fire/explosion) Healdton had in effect two insurance policies from Tri-State, the general liability policy (G085436) and the automobile liability policy (A005111) each with a coverage of $1,000,000.

3. On October 16, 1991, while performing services for Citation under Healdton's Master Service Contract, Michael McElroy was seriously injured when a Citation tank exploded into flames,

[3] In the interest of brevity the Court will condense wherever possible the factual statements.

burning McElroy over a large portion of his body. McElroy sued Citation alleging negligence in Citation's maintaining and opening its tank for cleaning.

4. In connection with the McElroy litigation, Tri-State took the position that Citation had never been added as an additional insured on the general liability insurance policy. Tri-State did not pay any portion of the McElroy settlement sum of $2.75 million.[4]

5. Wayne Wood is and has been an insurance agent for the Silvey Companies, including Tri-State, for about 20 years.

6. Wayne Wood has placed insurance to meet Healdton's business needs for about 15 to 18 years.

7. In order to meet the requirements of the Master Service Contract, Fred Tayar, then president of Healdton, contacted Wayne Wood and instructed him to add Citation as an additional insured on Healdton's general liability and automobile insurance policies issued by Tri-State.

8. Wood's normal practice with Tri-State when adding an additional insured to a Tri-State policy is to notify Tri-State that the additional insured should be added. Tri-State then follows through with the agent's notification by adding the additional insured.

9. Wood contacted Tri-State and notified Tri-State by letter

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[4] Tri-State "contests" these undisputed facts, as follows: "Tri-State disputes that failure to pay under their General Liability Policy was due solely to Citation not being an additional insured. It was and is Tri-States' position that there are many coverage issues under the General Liability Policy."

that Citation should be named as an additional insured on both policies and that coverage on both policies should be increased to $1 million. Wood understood Tri-State carried out his instructions and was never notified by Tri-State that the requested changes had not been made or that the usual procedure would not be followed.

10. Wood issued a Tri-State Certificate of Insurance to Healdton and Citation showing Citation as an additional insured on both Healdton's general liability and automobile policies. By issuing the Certificate of Insurance Wood intended it to reflect that Citation was an additional insured on both policies.

11. Wood issued the Certificate of Insurance in accordance with his normal practice as an agent of Tri-State and in accordance with his normal and customary practices in his dealings with Healdton.

12. Until Wood learned through town gossip about the McElroy settlement, no one from Tri-State had contacted Wood to investigate the status and scope of Healdton's coverage under the Tri-State policies.

13. Until Wood was contacted to arrange for his deposition, no one from Tri-State had been in contact with Wood to investigate whether there was any coverage applicable to Healdton or Citation arising out of this incident.

14. When Tayar notified Wood that Tri-State claims Healdton had no coverage for Citation as an additional insured under the general liability policy Wood advised Tri-State he had a copy of his letter to Tri-State advising Tri-State Wood has requested such

coverage.

15. Tri-State had a copy of Wood's letter, dated September 25, 1990, in its files at all relevant times.

LEGAL ANALYSIS

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing

there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

> ". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

Initially, the Court concludes Tri-State has failed to adequately respond to Healdton's Statement of Facts As To Which No Material Dispute Exists, thereby being in direct violation of Local Rule 56.1 (B). However, as pointed out in the Court's earlier Order in Federal/Tri-State, failure to properly refute "undisputed facts" is arguably insufficient for the Court to treat the same as undisputed facts, irrespective of the strong language of Local Rule 56.1 (B). See, John v. Louisiana, 757 F.2d 698, 709 (5th Cir.1985).

Further, the prime if not sole reason cited by Healdton in its breach of contract issue is that Tri-State "has breached its contract with Healdton by refusing to recognize Citation as an additional insured on the general liability policy." Healdton's Motion and Brief, page 8. In its motion Healdton asks the Court to reform the general liability insurance contract to include Citation as an additional insured. This has, in effect, been done by Tri-State's recent admission that Citation is an additional insured.

In view of Tri-State's acknowledgement that "for purposes of

this litigation, Tri-State Insurance Company will admit that Citation Oil & Gas Corporation was an additional named insured on their General Liability Policy"[5], this issue is, in the Court's view, moot. However, in the Court's opinion, admission that a party is included as additional insured on an insurance policy does not, by that fact alone, mean that the party is entitled to automatically recover under the policy on a given incident. There must, of course, be coverage of the event.

Additionally, Healdton was not the party sued by McElroy in the underlying tort action, Citation was. The claiming party must still establish the incident triggered coverage under the policy. Citation undertakes this chore in its Motion for Partial Summary Judgment against Tri-State on the breach of the insurance contract issue, which will be discussed, *infra*.

In view of the admission by Tri-State that Citation may be considered an additional insured under the general liability policy issued by Tri-State to Healdton, the Court concludes Healdton's motion for partial summary judgment on that issue should be denied as moot.

As to the bad faith issue upon which Healdton seeks partial summary judgment against Tri-State, the Court concludes there may be material facts in dispute as to all of the reasons for Tri-State's refusal to pay any part of the McElroy settlement. It is certain that at least one of the reasons was, until recently, it

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[5] See Exhibit A to Tri-State's Response to Healdton's Motion for Partial Summary Judgment.

considered Citation as not an additional insured under the general liability policy.

Tri-State disingenuously provided the Court with over 400 pages of continuous deposition testimony[6], with specific reference to only six of those pages. Tri-State cavalierly offers "contested facts" to refute Healdton's bad faith argument by stating:

> "It was and is Tri-States' position that there are many coverage issues under the General Liability Policy. See deposition of Gary Renneckar attached as Exhibit "B" without exhibits. See deposition of David Dyke attached as Exhibit "C". See deposition of Rob Fagerburg attached as Exhibit "D". See deposition of John Hammond attached as Exhibit "E" at pages 14 thru 19. Exhibits B-D outline the many coverage issues in addition to the additional insured issue.
>
> 2) There are disputed facts as to whether Tri-State's action were reasonable. See deposition of John Hammond attached as Exhibit "E"."

The Court concludes Tri-State's response to Healdton's Motion For Partial Summary on the issue of bad faith is in obvious violation of Local Rule 56.1 (B) which provides in part:

> B. Response Brief. The response brief to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies. and, if applicable, shall state the number of the movant's fact that is disputed."

The Court declines to consider Tri-State's "contested facts" and if no amended response is filed by Tri-State within 10 days from the date of this Order, the Court will proceed with its

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[6] Exhibit B, deposition of Gary Renneckar, pages 1-153; Exhibit C, deposition of David Dyke, pages 1-49; Exhibit D, deposition of Robert Fagerburg, pages 1-135; Exhibit E, deposition of John A. Hammond, pages 1-65.

decision *viz-a-viz* Healdton's Motion For Partial Summary Judgment on the issue of bad faith.

CITATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST TRI-STATE ON THE BREACH OF CONTRACT ISSUE

Citation's original motion was against both Tri-State and Healdton. In view of Citation's settlement with Healdton[7] subsequent to such filing, the motion stands against Tri-State only. Further, the "motion gives the Court the opportunity to resolve (Tri-State's) liability on the breach of contract claim, leaving only damages and the bad faith claim to be resolved by jury trial.

Initially, it appears this issue is much like Healdton's breach of contract issue against Tri-State, i.e. Tri-State's recent admission that Citation is an additional insured under the general liability policy renders moot the breach of contract issue between Citation and Tri-State. However, Citation seeks a ruling from the Court that both the general liability policy and the automobile policy have been breached by Tri-State, leaving only, for the jury, the issues of damages and the bad faith claim.

Citation offers the following undisputed facts:

(1) Healdton agreed to indemnify Citation against claims like those brought by McElroy.

(2) Tri-State issued Healdton the two policies of insurance with $1 million limits each as to which Citation is an additional

[7] See docket # 56.

insured and which were in effect at the time of the injury to McElroy.

(3) $2.75 million was paid to settle the McElroy Litigation and that amount was reasonable in light of the risk.

(4) Tri-State has paid none of the cost of settlement; and

(5) Healdton has paid none of the cost of the settlement.

In its response Tri-State offers the following "Disputed Facts":

1) What is the basis or reason Federal paid 2.75 Million Dollars to settle the McElroy litigation?

2) Is the basis or reason Federal paid 2.75 Million Dollars to settle the McElroy litigation covered under Tri-State's general liability policy?

3) Is the basis or reason Federal paid 2.75 Million Dollars to settle the McElroy Litigation covered under Tri-State's automobile policy?

4) If Tri-State's auto policy applies, it would be pro-rata with Federal's automobile policy.

Citation argues that three of four of Tri-States' Disputed Facts are questions and are also wholly irrelevant to the issues between Citation and Tri-State. The Court agrees and observes that the fourth "Disputed Fact" is in effect a mixed question of law and fact. The Court will proceed to consider the matter based solely upon Citation's statement of undisputed facts.

Citation argues that Tri-State's general liability policy Coverage A, as modified by the Additional Insured endorsement,

insured Citation against all sums Citation became "legally obligated to pay as damages because of 'bodily injury' . . ."[8]. Citation argues its payment pursuant to the McElroy Litigation falls within that coverage and that no exclusions apply.

Tri-State counters this argument by averring that despite Citation being an additional insured under Tri-State's general liability policy with Healdton, the additional insured form (CL-245(11/85)[9] limits Tri-State's coverage of Citation's liability to "Healdton's work". The specific language in the additional insured endorsement, upon which Tri-State rests this argument, is:

> "1. WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization (called "additional insured" shown in the Schedule but only with respect to liability arising out of:
> A. "Your work" for the additional insured(s) at the location designated above, or
> B. Acts or omissions of the additional insured(s) in connection with their general supervision of "your work" at the location shown in the Schedule."

Citation's reply is that it, as an additional insured, stands in the same place as the original insured, Healdton, and therefore all provisions of the insurance contract apply to provide coverage in the absence of an explicit provision to the contrary. Citation also argues that Healdton's subcontractor McElroy was performing Healdton's and Citation's work under the Master Service Agreement

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[8] COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
1. Insuring Agreement.
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies.

[9] Exhibit B is not the original additional insured from but a facsimile. Citation raises no objection to this.

when McElroy was injured.

The Court considers Citation's argument that "Healdton's work" is also "Citation's work" unpersuasive. Also unpersuasive is Citation's position that it stands in the same place as Healdton since the very language pointed to treats Healdton and Citation as separate entities relative to the policy.[10]

Notwithstanding, the Court is of the view that the record fails to reveal how much and if Citation "generally supervised" Healdton's contract work for Citation that gave rise to the fire/explosion.[11] Consequently, the Court concludes there are genuine disputes as to material facts which precludes granting partial summary judgment in favor of Citation and against Tri-State on the breach of contract issue relating to the general liability policy.

Citation also argues that Tri-State's automobile policy insured Citation against all sums Citation legally must pay as damages because of 'bodily injury' resulting from the ownership, maintenance or use of a covered 'auto' and that pursuant to Section 1 and the Declaration page, liability coverage was provided for

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[10] For example, "A." speaks of "'Your work' for the additional insured(s)" and "B" speaks of "Acts or omissions of the additional insured(s) in connection with their general supervision of 'your work'".

[11] In the various motions the Court has been consistently stymied by the lack of stipulated to or judicially determined facts of the fire/explosion itself. For example, there are suggestions in the record that the fire/explosion may have been ignited by McElroy's automobile. These second and third hand hearsay revelations and other "town gossip" are of no aid to the Court in the present motions.

'any auto', with no exclusions applying.

Tri-State counters that "[T]he most telling evidence that Federal did not believe the McElroy litigation was coverage (sic) under an automobile policy was the fact Federal did not pay under Citation's own automobile policy." This non-sequitur is of no assistance to the Court.

Tri-State also offers the deposition testimony of Virginia Ann Revard, an insurance investigator for Federal (the Chubb group), taken in the Federal/Tri-State litigation, for the proposition that "none of the allegations she knew of or based the McElroy litigation settlement on arise out of the use of an automobile". Again, the Court is not aided by the testimony of an insurance investigator of what she doesn't know. Tri-State argues that Citation alleges in its brief (page 5) that "if the money in the McElroy litigation w[as] paid due to a fire ignited by Mr. McElroy's vehicle . . . there would be no coverage under Tri-State's general liability policy because it excludes injuries arising out of automobile use." The exclusion Tri-State refers to is:

> "g. 'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or referred or loaned to any insured. Use includes operation and "loading or unloading."

Citation answers this argument by the language of the additional insured endorsement, which states:

> "A. None of the exclusions under Coverage A. except exclusions (a), (d), (e), (f), (h2), (i), and (m) apply to this insurance."

Since paragraph (g) was not included, it appears to the Court this is a complete answer to Tri-State's exclusion argument.

Tri-State also argues that because of exclusion "g" (which the Court concludes is not applicable herein) and because both of Tri-State's general liability policy and automobile policies are on Insurance Services Office, Inc. (ISO) forms, which "dovetail, not overlap"[12], there cannot be coverage under both policies on this same event. Tri-State fails to cite any authority in support of its rather novel premise, and in fact the law is to the contrary. State Farm Mut. Auto Ins. Co. v. Wendt, 708 P.2d 581 (Okl.1985); Keel v. MFA Ins. Co., 553 P.2d 153, 156 (Okl.1976). The Court concludes Tri-State's argument on this issue is wholly lacking.

The Court is of the view that if it were an established fact that fire/explosion occurred as a result of involvement of an 'auto', there would be coverage under the Tri-State automobile policy. As in the issue of the general liability policy, this unresolved fact precludes summary judgment in favor of Citation. Accordingly, Citation's Motion for Partial Summary Judgment on the breach of contract issue relating to the Tri-State automobile policy should be denied.

SUMMARY

In summary, the Court Healdton's motion for partial summary judgment on the breach of contract issue should be and the same is hereby denied as moot. Healdton's motion for partial summary

[12] The Court fails to grasp the "similar forms/dovetail" argument.

judgment on the bad faith issue is deferred for later ruling. Citation's Motion for Partial Summary Judgment on the breach of contract issue relating to both the Tri-State automobile policy and the Tri-State general liability policy should be and the same is hereby denied.

The parties are ordered to adhere to the following schedule:

September 8, 1995	EXCHANGE THE NAMES AND ADDRESSES OF ALL WITNESSES, INCLUDING EXPERTS, IN WRITING, ALONG WITH A BRIEF STATEMENT REGARDING EACH WITNESS' EXPECTED TESTIMONY (NOT NECESSARY IF WITNESS' DEPOSITION TAKEN)
September 22, 1995	FINAL PRE-TRIAL CONFERENCE AT 1:30 P.M.
October 2, 1995	FILE AN AGREED PRETRIAL ORDER AND EXCHANGE ALL PRENUMBERED EXHIBITS (PARTIES SHALL FILE A JOINT STIPULATION AS TO ALL FACTS AGREED UPON)
October 10, 1995	FILE REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ANY TRIAL BRIEFS
October 16, 1995	NON-JURY TRIAL AT 9:30 A.M.

IT IS SO ORDERED this 14th day of August, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
STATE OF OKLAHOMA

FILED

AUG 14 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ARLENE BROWN-McLEMORE,

Plaintiff,

vs.

STANLEY GLANZ, individually and in his official capacity as Sheriff of Tulsa County, Oklahoma; and

CORRECTIONAL MEDICAL SYSTEMS, INC.

MILA RENEAU, individually, and in her official capacity as a jailers and custodians of the inmates of Tulsa County Jail,

Defendants.

Case No. 93-C1116-H

ENTERED ON DOCKET

DATE AUG 15 1995

ORDER GRANTING DISMISSAL OF MILA RENEAU

NOW, on this 11TH day of August, 1995, upon the Motion Granting Dismissal of Mila Reneau, filed by David C. Phillips, of the LAW OFFICES OF MAYES & PHILLIPS, P.C., the Court finds that for good cause shown, said Motion should be **GRANTED.**

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, by the Court that said Order be **GRANTED** and Mila Reneau is dismissed with prejudice.

U.S. District Court Judge

APPROVED:

MAYES & PHILLIPS, P.C.

David C. Phillips, III
115 West 3rd St. Ste. 515
Tulsa, Oklahoma 74103-3422
(918) 583-4100 Fax # 583-4138

IN THE UNITED STATES DISTRICT COURT
STATE OF OKLAHOMA

ARLENE BROWN-McLEMORE,

Plaintiff,

vs.

STANLEY GLANZ, individually and in his official capacity as Sheriff of Tulsa County, Oklahoma; and

CORRECTIONAL MEDICAL SYSTEMS, INC.

LORI LITTLE and MILA RENEAU, individually, and in their official capacity as jailers and custodians of the inmates of Tulsa County Jail,

Defendants.

Case No. 93-C1116-H

FILED

AUG 14 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE AUG 15 1995

ORDER GRANTING DISMISSAL OF LORI LITTLE

NOW, on this 11th day of August, 1995, upon the Motion Granting Dismissal of Lori Little, filed by David C. Phillips, of the LAW OFFICES OF MAYES & PHILLIPS, P.C., the Court finds that for good cause shown, said Motion should be GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, by the Court that said Order be GRANTED.

S/ SVEN ERIK HOLMES
U.S. District Court Judge

APPROVED:

MAYES & PHILLIPS, P.C.

David C. Phillips III

David C. Phillips, III
115 West 3rd St. Ste. 515
Tulsa, Oklahoma 74103-3422
(918) 583-4100 Fax # 583-4138

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the _____ day of _____, 1995, a true and correct copy of the foregoing Order granting was mailed U.S. Mail, certified mail, return receipt required and hand delivered to the following:

RETURN RECEIPT REQUIRED/HAND-DELIVERED

Michael t. Maloan
Foliart, Huff, et al.
20th Floor
First National Center
120 North Robinson
Oklahoma City, Oklahoma 73102

Fred Morgan
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103

David C. Phillips, III

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAULA E. WILKERSON
SS# 466-13-0666
Plaintiff,

v.

SHIRLEY S. CHATER,[1]
Commissioner Social Security
Administration
Defendant.

NO. 93-C-1046-H

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff, Paula E. Wilkerson, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2]

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson*

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[1] *Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Recommendation continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.*

[2] *Ms. Wilkerson's February 18, 1992 (protective filing date, December 5, 1991) application for disability benefits was denied June 25, 1992, the denial was affirmed on reconsideration, September 17, 1992. A hearing before an Administrative Law Judge was held March 5, 1993. By order dated April 28, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 15, 1993. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.*

(12)

v. Perales, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence and that the Administrative Law Judge ("ALJ") failed to perform the correct analysis. Specifically, Plaintiff claims that the ALJ failed to consider the psychological aspects of her and her ability to deal with stress. The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the ALJ has adequately and correctly set forth the relevant facts of this case and applied the proper legal principals to these facts [R. 14-32]. The Court therefore incorporates these findings into this Report and Recommendation as the duplication of this effort would serve no useful purpose.

The ALJ determined that Plaintiff could return to her past relevant work. However, in his decision the ALJ referred to that work as an assembler I position at the sedentary level. It is clear that Plaintiff never worked at such a job. It is also clear from a review of the vocational expert's testimony that the ALJ meant to identify the sedentary security guard position discussed at pages 39 and 63-4 of the record as the past relevant work.

Plaintiff claims that the ALJ failed to properly evaluate the demands of Plaintiff's past relevant work in accordance with *Henrie v. U.S. Dept. of Health & Human Services*, 13 F.3d 359 (10th Cir. 1993) and SSR 82-62. In this regard, the ALJ is required to inquire into the demands of Plaintiff's past relevant work, to compare those demands to Plaintiff's residual functional capacity and to make appropriate findings. *Henrie*, 13 F.3d at 361. The demands of Plaintiff's past relevant work are found in the record at pages 39-40, 62-63; findings concerning

Plaintiff's past relevant work are found in the record at pages 39-40, 62-63; findings concerning Plaintiff's residual functional capacity are found at pages 19 & 20, and 63-64; comparison of the work demands to the residual functional capacity are found at page 20. The ALJ developed the record and evaluated the physical demands of Plaintiff's past relevant work.

However, even if the ALJ were deemed to have fallen short of his duties in developing the demands of Plaintiff's past work, this failing would not merit reversal of the Secretary's decision. The ALJ elicited testimony from the vocational expert establishing the prevalence of occupations Plaintiff could perform given her age, education, work experience and residual functional capacity [R. 62-64]. This is the type of evidence properly used to resolve the question of disability at step-5. See Generally, 20 C.F.R. §§ 404.1520(f), 404.1566, 416.920(f) and 416.966. The record supports a denial of benefits, even at step-5.

Although the ALJ did not specifically mention each and every medical note, the Court finds that the ALJ properly evaluated the Plaintiff's mental impairment. The records maintained by Plaintiff's treating mental health professionals relate some family problems but that Plaintiff "appears stable" on November 30, 1992 and January 13, 1993 [R. 339-40]; that she is "doing better now" on November 30, 1992 [R. 341]; and on October 1, 1992 she was "doing ok" [R. 342].

Plaintiff claims that the ALJ failed to factor her low tolerance to external stress into her residual functional capacity. That she has low tolerance for stress is documented in the record at page 300. The Court notes that at page 67 of the record Plaintiff's counsel questioned the vocational expert as to whether given a low tolerance for stress, Plaintiff could perform her past relevant work. The vocational expert testified that her former work as a cashier may be

precluded, but that she could perform sedentary "gate-tending" jobs where she would be insulated from primary stressors [R. 67-68]. Taking the record as a whole, there is substantial support in the record for the conclusion that the mental impairments do not impose such significant restrictions as to prevent Plaintiff from performing her past relevant work as a sedentary security guard.

The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that the decision of the Secretary finding Plaintiff not disabled be AFFIRMED.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right

to appeal from a judgment of the district court based upon the findings and recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

SO ORDERED THIS 14th day of AUG., 1995.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOB STICE)
)
Plaintiff,)
)
v.) NO. 94-C-1016-M
)
SHIRLEY S. CHATER, [1])
Commissioner, Social Security)
Administration,)
Defendant.)

ORDER

Plaintiff, Bob Stice, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits. In accordance with 28 U.S.C. §636(c)(1)&(3) the parties have consented to proceed before the undersigned United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

Mr. Stice's July 8, 1991 application for disability benefits was denied February 10, 1992, the denial was affirmed on reconsideration, May 8, 1992. A hearing before an Administrative Law Judge ("ALJ") was held October 21, 1992. The ALJ initially denied benefits [R. 386-407], then on the basis of additional medical evidence, the ALJ reopened the claim and issued a decision finding Plaintiff entitled to a period of disability commencing on December 25, 1992, but not before [R. 423-446]. The Appeals Council reversed the ALJ's decision on November 5, 1993, remanding the matter for further hearing and evaluation [R. 461-3]. A second hearing was held February 1, 1994. The ALJ's decision dated February 25, 1994 determined that Plaintiff has been under a disability as defined in the Social Security Act since April 1990 so as

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[1] *Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.*

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to entitle him to Supplemental Security Income from his protective filing date, July 8, 1991, but that he was not disabled at any time on or before his last insured date, December 31, 1987 [R.24-37]. The February 25, 1994 decision, which is the subject of this appeal, was affirmed by the Appeals Council. The decision represents the final decision of the Secretary/Commissioner for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The record of the proceedings has been meticulously reviewed by the Court with particular emphasis on the medical records generated between December 1987 and April 1990. The undersigned United States Magistrate Judge finds that the ALJ has adequately and correctly set forth the relevant facts of this case and applied the proper legal principals to these facts [R. 27-37]. The Court therefore incorporates these findings into this order as the duplication of this effort would serve no useful purpose.

In his brief Plaintiff states he "concedes that the ALJ's decision is supported by the evidence through November 1987" [Dkt. 5, p.4].[2] Plaintiff claims that his complaints of back pain rendered him disabled beginning December 1987, rather than in April 1990 as found by the ALJ. The specific question posed in this appeal is whether there is substantial support in the record to support the ALJ's finding that Mr. Stice could perform medium[3] work activity during the time period from December 1987 to April 1990.

The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines [R. 32-34]. The Court notes that the testimony of Plaintiff and his wife concerning Mr. Stice's activities and abilities during the 1987 to 1990 time frame was somewhat vague. This is entirely understandable considering that they were testifying in 1992 and 1994, several years after the time frame in question. Their testimony about Mr. Stice's problems and limitations is much more specific for the post-1990 time period. This too is understandable due to the passage of time and because in 1990 Mr. Stice began to experience a dramatic change in condition, including swelling of his ankles and

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[2] *The docket number refers to the internal document numbering system used by the Court Clerk in the Northern District of Oklahoma. The numbers are for reference only and have no independent legal significance.*

[3] *Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. §§ 404.1567(c), 416.968(c).*

feet, as well as kidney problems and a heart condition. The Court finds that the ALJ evaluated the record, Plaintiff's credibility, and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

The Court finds no support for Plaintiff's assertion that the ALJ restricted his review of the medical records just to the pre-December 1987 period of time. The problem is that there is not a great deal of medical evidence concerning the 1987 to 1990 time frame, a fact specifically recognized by Plaintiff's counsel at the first hearing. [R. 76]. ("From 1987 to 1991 when he first came to the hospital there wasn't a whole lot of information on that . . ."). In his decision the ALJ outlined the medical evidence related to Plaintiff's back problems. The analysis included medical records both before and after December 1987. (e.g. March 1988 myelogram, R. 32; July 1990 myelogram, R. 34).

The ALJ concluded that Mr. Stice retained the residual functional capacity to engage in medium and light work until he became disabled beginning April 1990 [R. 34-36]. On October 23, 1986, Dr. Mayoza, Plaintiff's treating physician, expressed the following opinion concerning Plaintiff's ability to work:

> Residual permanent partial disability which I would assess to be 30% of the body as a whole. His condition is permanent in my opinion in allowing to return to his work activities with restriction of heavy lifting not to exceed 50 pounds. [R. 254].

Plaintiff contends that this October 23, 1986 capacity for lifting 50 pounds is not valid for the entire period between 1987 and 1990. However, as previously stated, Plaintiff agrees that the ALJ's decision that Plaintiff could perform medium and light work is supported by the evidence through November, 1987. The Court, having determined that the ALJ's conclusions concerning Plaintiff's pain and credibility are supported by substantial evidence, is left with the remaining

question of whether the medical evidence supports, or fails to contradict, the conclusion that from December 1987 to April 1990 Plaintiff retained the capacity to perform such work.

The medical entries specifically concerning Plaintiff's ability to work are the October 1986, 50 pound limitation [R. 254], a March 1987 reiteration of that limitation [R. 253], and an April 21, 1988 reiteration of a 30% permanent partial disability limitation [R. 249]. Also, throughout the medical records Dr. Mayoza makes several comments about Plaintiff's inability to return to his *former* work [R. 245, 246, 247, 249]. And, while Dr. Mayoza comments that Plaintiff "continues to be disabled", in context this comment refers to Plaintiff's ability to do his former work as the doctor goes on to recommend vocational rehabilitation [R. 248].

The Court notes that the medical records do not chronicle constant pain. On April 21, 1988, the doctor notes Mr. Stice's statement that he has had *recurrent episodes* of lumbosacral pain [R. 249]. Dr. Mayoza also noted that a April 8, 1988 prescription of Darvocet-N provided relief of discomfort. There is no suggestion in the medical records that Plaintiff's condition was so changed from 1987 to 1990 that he was unable to perform medium and light work as a result of his back problems or pain. In fact, that Mr. Stice was able to perform such work is supported by a "Physician Statement of Physical Restraints" completed by Dr. Mayoza on April 11, 1990 [R. 385]. On that form Dr. Mayoza indicated that Mr. Stice could occasionally[4] lift and carry 20-50 pounds and could frequently lift and carry 10-20 pounds. Dr. Mayoza was also of the opinion that Mr. Stice could occasionally push, pull, twist, stoop, and kneel but that he could never climb or lift and carry over 50 pounds. His ability to stand, sit and walk were each rated as "frequently". Although the ALJ found that Mr. Stice was disabled as of April 1, 1990

[4] *Occasionally is defined as 1-3 hours of an 8 hour day; frequently is 3-5 hours of an 8 hour day.*

for reasons unrelated to his back, it is especially significant that his orthopedic surgeon found him capable of doing this level of work.

The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled before April 1990 is AFFIRMED.

SO ORDERED THIS 14th day of August, 1995.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHYLLIS PRINCE Plaintiff, v. DONNA E. SHALALA,[1] Secretary of Health and Human Services, Defendant.	)	NO. 94-C-155-B

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff, Phyllis Prince, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] The matter has been referred to the undersigned United States Magistrate Judge for Report and Recommendation.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by

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[1] *Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Report and Recommendation continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.*

[2] *Ms. Prince's April 23, 1991 application for disability benefits was denied November 8, 1991, the denial was affirmed on reconsideration, May 29, 1992. A hearing before an Administrative Law Judge was held June 21, 1993. By order dated September 9, 1993, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 23, 1993. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.*

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substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The Court finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the facts and the regulatory sequential evaluation process applicable to this case. The Court therefore incorporates that information into this order as the duplication of this effort would serve no useful purpose.

The ALJ determined that Ms. Prince has the residual functional capacity to perform her past relevant work as a housecleaner, cafeteria worker, and teachers' aide, which are medium to light unskilled work [R. 66-67]. Plaintiff alleges that ALJ improperly rejected the opinion of her treating physician; that the ALJ improperly assessed the Plaintiff's credibility; and that the record does not support the determination of the Secretary by substantial evidence.

TREATING PHYSICIAN'S OPINION

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). A treating physicians' opinion may be rejected if it is brief, conclusory and unsupported by medical evidence.

Specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen,* 816 F.2d 508 (10th Cir. 1987). And, while a physician may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if treating physician's progress notes contradict his opinion, it may be rejected).

In this case the ALJ assigned reduced weight to the opinion of Dr. Weldon, Ms. Prince's treating physician. The ALJ stated: "Many limitations expressed by Dr. Weldon are without support of impairment, such as avoidance of temperature extremes or avoidance of noise and vibrations, and the validity of any other limitations are cast into doubt." (emphasis in original) [R. 15]. The ALJ called Dr. Weldon's opinion "conclusory and sympathetic". *id.*

At the time her opinion was submitted, Dr. Weldon had treated Ms. Prince for at least five years [R. 206]. The record contains a pages long prescription record reflecting monthly prescriptions for a variety of medications [R. 177-181] and, at least sixteen separate occasions of trigger point injections of Xylocaine for pain relief [R. 161-176]. The record reflects a significant history of treatment for pain flareups and headaches. There are numerous references to right arm pain, an inability to lift her arm, and to repeated anxiety or panic attacks. [R. 142-154; 186-192]. The Court finds that the functional limitations listed by Dr. Weldon are supported by her clinical notes and that the ALJ's reasons for rejecting the opinion are not supported by the record.

QUESTIONING OF VOCATIONAL EXPERT

The Court finds the ALJ's questioning of the vocational expert to be infirm because of his rejection and mis-interpretation of the treating physicians' opinion. The ALJ included in the hypothetical to the vocational expert that Ms. Prince could lift 25 to 50 pounds, stand 6 hours per day and sit 6 hours per day. There is no support in the record for those assertions. Dr. Weldon's assessment that Ms. Prince can only occasionally lift up to 10 pounds is uncontradicted in the record. The consultive psychologist, Dr. Gordon, summarized data gleaned from a chronic pain battery and determined Ms. Prince's capabilities to be in the sedentary range [R. 195], a finding consistent with the restriction of an ability to lift only 10 pounds.

Dr. Weldon reported that Ms. Prince's sitting tolerance was ten minutes and her standing tolerance ten to twenty minutes [R. 206-207]. Appended to Dr. Weldon's medical report was a medical evaluation form which asked for the residual functional capacity to stand, walk, and sit. The questions gave two choices for an answer: "less than about six hours" or "about six hours or more". Dr. Weldon checked the "less than six hours" answer for sitting and standing [R. 210]. The form also asked about the ability to sit continually and provided the following categories for answers: "less than two hours" or "about two hours or more" [R. 211]. Dr. Weldon checked "less than two hours". The ALJ took this information and reinterpreted it in his decision, as follows:

> Dr. Weldon states that the claimant could occasionally lift 10 pounds, stand and walk less than 6 hours and sit for less than 6 hours, but she could sit continuously for under 2 hours which are not consistent with an inability to work. [R. 15].

Reading Dr. Weldon's report as a whole, one cannot reach the ALJ's conclusion. The operative word in those findings is "less". In the narrative portion of her report, Dr. Weldon qualified

the word "less" in terms of mere minutes. ***Hargis v. Sullivan***, 945 F.2d 1482, 1492 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the secretary's decision." The Court finds that the ALJ's hypothetical question to the vocational expert did not precisely relate all the claimant's impairments. Therefore, according to *Hargis*, the ALJ's decision which relied upon the vocational expert's testimony is not supported by substantial evidence.

ASSESSMENT OF MENTAL CONDITION

In addition, recent Tenth Circuit case law mandates a finding that the ALJ's analysis of Ms. Prince's mental condition was inadequate. In *Cruse v. U.S. Dept. of Health & Human Services*, 49 F.3d 614 (10th Cir 1995), the Court was critical of the use of the "Medical Assessment of Ability To Do Work-Related Activities (Mental)" form which was employed in this case by Dr. Gordon [R. 197-8]. The factors evaluated on the "Mental Assessment" form do not match the requirements of §12.07, the listing for somataform disorders.

To meet the listing requirements under the Part B criteria regarding the severity of the impairment, the condition or impairment must result in at least three of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Frequent deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

> 4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation (decompensation) or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors). 20 C.F.R. Pt. 404, Subpt. P, App.1, §12.07 B.

However, the "Mental Assessment" form asks for evaluations of claimant's abilities in three work-related areas: making occupational adjustments, making performance adjustments, and making personal-social adjustments. Then, rather than evaluating the severity of a claimant's functional impairments using the same terms as the listing requirements, the mental assessment forms evaluate the claimant's abilities as "unlimited/very good," "good," "fair," and "poor or none." The terms have specialized meanings defined on the form [R. 197]. Of particular concern, is the term "fair."

Describing a functional ability as "fair" would seem to imply no disabling impairment, however, "fair" is defined to mean: "Ability to function in this area is seriously limited but not precluded" [R. 197]. The *Cruse* Court concluded that "seriously limited but not precluded" is essentially the same as the listing requirements' definition of the term "marked". *Cruse*, 49 F.3d at 618. "Marked" is defined at § 12.00 C:

> Where "marked" is used as a standard for measuring the degree of limitation, it means more than moderate, but less than extreme. A marked limitation may arise when several activities or functions are impaired or even where only one is impaired, so long as the degree of limitation is such as to seriously interfere with the ability to function independently, appropriately and effectively.

In *Cruse*, the Court found that use of the term "fair" as it is defined on the medical assessment form is evidence of *dis*ability. *Cruse*, at 618.

Looking at Dr. Gordon's assessment in that light, it appears Ms. Prince may meet the listing requirements. Dr. Gordon found Ms. Prince to have seriously limited ("fair") abilities

to relate to co-workers, deal with the public, use judgment with the public, interact with supervisors, deal with work stresses, function independently, understand remember and carry out detailed but not complex job instructions, maintain personal appearance, behave in an emotionally stable manner, and relate predictably in social situations. The criteria and terminology in the mental assessment form differ from the listing to a degree that the Court cannot determine whether the ALJ's conclusion that Ms. Prince does not meet the listing requirements is supported by substantial evidence.

Accordingly, the undersigned United States Magistrate Judge recommends that the case be REMANDED for further evaluation of Ms. Prince's ability to perform work in light of the limitations supported in the record as discussed herein and for consideration of her mental impairments in relation to the listing requirements.

DATED THIS 14th DAY OF August, 1995.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 14 [illegible]
Richard M. [illegible]
U. S. [illegible]
NORTH[illegible]

BOB STICE,)
)
Plaintiff,)
)
v.) NO. 94-C-1016-M
)
SHIRLEY S. CHATER,)
Secretary of HHS)
)
)
)
Defendant.)

ENTERED ON DOCKET
DATE AUG 15 1995

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this 14th day of AUG, 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 14 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

OSCAR DURANT,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1/]

Defendant.

No. 92-C-942-J

ENTERED ON DOCKET
DATE AUG 15 1995

JUDGMENT

This action has come before the Court for consideration. An Order remanding the case to the Administrative Law Judge was entered on May 16, 1995. Judgment is hereby entered pursuant to the Court's May 16, 1995 Order.

It is so ordered this 14 day of August, 1995.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

James L. Bell,
SSN: 441-48-0011,

v.

Shirley S. Chater,
Commissioner of the Social
Security Administration,

Defendant.

Civ. 92-1087-E

O R D E R

The Court, having considered Petitioner's Application and Motion for Final Order for Attorney Fees Under 28 U.S.C. Section 2412, the Equal Access to Justice Act (EAJA), and having reviewed the arguments and representations of counsel, finds:

1) Petitioner requests attorney fees pursuant to 28 U.S.C. Section 2412, based upon a successful challenge of Defendant's decision denying Plaintiff's Social Security Disability benefits (SSD). The parties have stipulated that $115.80 per hour for $5,158.55 and compensable expenses in the amount of $144.45 is a fair and reasonable amount under 28 U.S.C. Section 2412.

2) The Court finds that the Defendant's position was not substantially justified, nor reasonable as to the facts of the case in originally denying the benefits, and that an award under the EAJA is justified, and the Court hereby sustains Petitioner's Motion for attorney fees.

3) That counsel, Mark E. Buchner, for Plaintiff has

expended 44.55 hours in pursuit of the Plaintiff's claim in the United States District Court for the Northern District of Oklahoma and that $115.80 per hour is a fair and reasonable hourly fee, and that a fee of $5,303.00 shall be awarded to Mark E. Buchner, Attorney at Law,

4) No attorney fee award has yet been made by the Defendant to Plaintiff's representive in the administrative proceedings before the Social Security Administration. Petitioner shall advise the Social Security Administration of this award and any request for fees related to the administrative proceedings, if any.

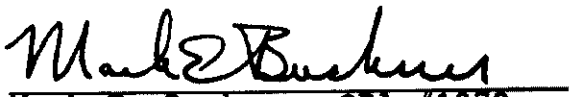
5) If an award of fees for work performed in this court is sought and awarded under 42 U.S.C. Section 406, Petitioner shall return to the Plaintiff the lesser of the Section 406 award or the amount awarded by this Order, pursuant to Weakley vs Bowen, 803 F.2d 575 (10th Cir., 1986).

IT IS THEREFORE SO ORDERED.

DATED this 14th day of August, 1995.

United States Judge

APPROVED:



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and

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case No. 93-C-38-B
4.0 ACRES, DELAWARE COUNTY, OKLAHOMA, MORE OR LESS, et al Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

The Plaintiff advised the Court that the related criminal trial in state court has been rescheduled and has no objections to administrative closing this case pending determination of the underlying state court criminal case, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, upon 60 days following final determination of the state court criminal case, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 11th day of August, 1995.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 14 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

LUTHERAN BENEVOLENT INSURANCE COMPANY,

Plaintiff,

v.

THE NATIONAL CATHOLIC RISK RETENTION GROUP, INC.,

Defendant.

Case No. 94-C-124-H

ENTERED ON DOCKET
DATE AUG 14 1995

O R D E R

This matter comes before the Court on Cross Motions for Summary Judgment by Lutheran Benevolent Insurance Company ("LBI") and The National Catholic Risk Retention Group, Inc. ("National Catholic").

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue

(18)

of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party

opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

I.

In this case, the parties have agreed that summary judgment is appropriate. The parties have stipulated to the material facts and have agreed that there are no remaining issues of fact to be resolved by the trier of fact. Therefore, the Court accepts the agreed upon facts set forth below for purposes of resolving the legal issues presented in the parties' motions.

LBI issued a series of one year insurance policies to Reverend Beltran, et al. including, but not limited to, The Catholic Diocese of Tulsa (the "Diocese") covering the period August 1, 1985 through August 1, 1991, with limits of one million dollars ($1,000,000.00) (collectively, "LBI I"). LBI issued another series of one year insurance policies to Reverend Beltran, et al. including, but not limited to, the Diocese covering the period August 1, 1991 through August 1, 1993 with limits of two hundred fifty thousand dollars ($250,000.00) (collectively, "LBI II"). Rev. Morris Dale Vanderford ("Vanderford") was an insured under LBI II, but only while acting within the scope of his duties as clergyman.

National Catholic issued a one year "excess" insurance policy to the Diocese covering the period August 1, 1992 through August 1, 1993 with limits of seven hundred and fifty thousand dollars ($750,000.00) over LBI II's underlying policy limits of two hundred and fifty thousand dollars ($250,000.00). The National Catholic

policy was an excess policy. The policy was an excess following form, which was excess to LBI II.

On or about March 19, 1993, Thomas Luce and Betty Luce, individually and as next friend of their minor son, Glenn K. Luce (collectively, the "Luces"), filed a Petition in a civil action styled Luce, et al. v. Morris Dale Vanderford, et al., Case No. C-93-147 in the District Court of Rogers County, Oklahoma (the "Oklahoma State Court Lawsuit"). In their Petition, the Luces alleged that Vanderford sexually and mentally assaulted their son commencing in May of 1991 and continuing thereafter. The Luces alleged that Vanderford forced their son to commit sexual acts upon him and vice versa at St. Cecelia Catholic Church (the "Church").

Further, the Luces alleged that Vanderford was an agent, servant, and/or employee of the Diocese and the Church. The Luces asserted intentional tort theories against Vanderford and respondeat superior, negligent hiring, and negligent retention theories against the Diocese and the Church. The Luces demanded damages for extreme emotional distress, mental pain and anguish, and psychological harm.

The Diocese put LBI and National Catholic on notice of the Luces' personal injury claims after the Oklahoma State Court Lawsuit was filed. LBI defended the Diocese against the Luces' claims. On or about August 18, 1993, National Catholic agreed to defend the Diocese for and against the Luces' claims under a reservation of rights pursuant to its August 1, 1992 through August 1, 1993 insurance policy.

On or about November 22, 1977, the Diocese retained Vanderford as a Catholic priest. In or about October of 1988, the Diocese assigned Vanderford to the Church. Vanderford sexually abused Glenn Luce at the Church from approximately April of 1991 and continuing thereafter until approximately March 9, 1993, when he was criminally charged. On or about April 29, 1993, Vanderford pled guilty to five counts of forcible sodomy, one count of indecent exposure, and five counts of lewd molestation.

No testimony, documents, or other evidence suggest that the Church or the Diocese knew or should have known of any alleged sexual misconduct on the part of Vanderford until on or after January 1, 1992.

In or about January of 1992, the Church and Diocese were first put on notice of sexual misconduct allegations against Vanderford. The Church and the Diocese investigated these allegations. The Church and the Diocese documented the substance of the allegations and their investigation in the memorandum dated January 17, 1992.

On or about January 21, 1992, the Church and the Diocese met with Vanderford to discuss the allegations and the procedures for dealing with such allegations including his suspension. The Church and the Diocese confirmed the substance of the meeting in a letter dated January 21, 1992.

The Church and the Diocese referred Vanderford to Laureate Psychiatric Hospital for a psychological evaluation. The evaluation was conducted on February 21, 1992. In or about March of 1992, the Church and the Diocese reinstated Vanderford

notwithstanding their knowledge of multiple allegations of sexual misconduct against Vanderford.

The Luces made a settlement demand in the amount of one million dollars ($1,000,000.00). On or about July 26, 1993, the Diocese wrote a letter to both LBI and National Catholic demanding that they contact the Luces' attorney to resolve the claims within the limits of policy coverage, if possible.

On or about September 3, 1993 and September 15, 1993, LBI wrote letters to National Catholic requesting it to participate in settlement discussions with the Luces' attorney and make its policy limits available in a settlement. National Catholic chose not to participate in settlement discussions with the Luces' attorneys. At the settlement discussions, the Luces, the Diocese, the Church, and Vanderford were able to reach a settlement of the Oklahoma State Court Lawsuit.

On or about October 21, 1993, LBI wrote to National Catholic informing it of the above-referenced settlement and demanded contribution. LBI also put National Catholic on notice of the settlement and LBI invited National Catholic to participate in a hearing to obtain court approval of the settlement.

On or about October 29, 1993, the above-referenced verbal settlement was ultimately reduced to a fully integrated written agreement when the Luces entered into a Settlement Agreement and General Release (the "Lawsuit Settlement").

In the Lawsuit Settlement, the parties stipulated and recited that "there are no facts supporting any claims against the Church

or the Diocese for negligent hiring." Under the terms of the Lawsuit Settlement, the Diocese agreed to pay the Luces the amount of seven hundred twenty-four thousand nine hundred and ninety-eight dollars ($724,998.00), the Church agreed to pay the Luces the amount of one dollar ($1.00), and Vanderford agreed to pay the Luces the amount of one dollar ($1.00). In exchange, the Luces gave their unconditional and full and final release of all claims against the Diocese, the Church, and Vanderford. For purposes of this Stipulation, the parties agree that the amount of the settlement was fair and reasonable.

Also, on or about October 29, 1993, LBI and the Diocese, the Church, and Vanderford entered into a Settlement Agreement and Assignment of Claims (the "Insurance Settlement"). Under the terms of the Insurance Settlement, LBI agreed to pay the Luces the amount of seven hundred and twenty-five thousand dollars ($725,000.00) on behalf of the Diocese, the Church, and Vanderford pursuant to the terms of the Lawsuit Settlement. In exchange, the Diocese, the Church, and Vanderford assigned to LBI their contractual, equitable, and/or legal subrogation and/or contribution claims against all parties including, but not limited to, National Catholic.

On or about October 29, 1993, the District Court of Rogers County, Oklahoma held a hearing on the Lawsuit Settlement and approved it. National Catholic declined to participate in the hearing.

LBI made a written demand to National Catholic for payment of four hundred and seventy-five thousand dollars ($475,000.00), the difference between the settlement amount and LBI's policy limits plus costs and expenses including attorneys' fees and other damages incurred by LBI and its insureds in connection with the Oklahoma State Court Lawsuit.

On or about January 7, 1994, National Catholic declined the demand of LBI to make contribution under its insurance policy for the Diocese's settlement obligations and/or costs and expenses including attorneys' fees incurred in the Oklahoma State Court Lawsuit.

II.

Plaintiff argues that the Diocese's act of negligence, placing Vanderford into a position where he would have contact with young boys after it had knowledge of the sexual misconduct allegations, is covered by the National Catholic excess insurance policy. The negligent retention occurred in or about March 1992. At that time, the Diocese was insured under the excess policy.

In determining whether Plaintiff's claim is covered by the National Catholic excess insurance policy, this Court is guided by the construction principles articulated by the Oklahoma Supreme Court. An insurance policy is a contract and should be interpreted according to the plain meaning of the language embodied in the contract. Wiley v. Travelers Ins. Co., 534 P.2d 1293, 1295 (Okl. 1974). "If the terms are unambiguous, clear and consistent, they are to be accepted in their ordinary sense and enforced to carry

out the expressed intention of the parties." Phillips v. Estate of Greenfield, 859 P.2d 1101, 1104 (Okl. 1993).

Further, an insurance policy should be construed in light of its predominant purpose -- to provide coverage to the insured. Dayton Hudson Corp. v. American Mut. Liability Ins. Co., 621 P.2d 1155, 1158 (Okl. 1980). Therefore, "in case of doubt", in interpreting the policy definition of an "occurrence", the Court construes exclusionary language most strongly against the insurer and liberally in favor of the insured. See Dodson v. St. Paul Ins. Co., 812 P.2d 372, 377 (Okl. 1991); All American Ins. Co. v. Burns, 971 F.2d 438, 442 (10th Cir. 1992).

Under the National Catholic excess policy, Plaintiff identifies the following language as providing general liability coverage in this case:

> [T]he Company agrees with the Insured as follows:
>
> I. COVERAGE
>
> A. To indemnify the Insured against Loss . . . by reason of bodily injury . . . during the policy period caused by an occurrence which Underlying Insurance provides the following coverage:
>
> (1) General Liability . . .

The National Catholic policy does not specifically define the terms, "bodily injury" and "occurrence", but, instead, adopts by reference the definitions contained in the LBI II primary policy. The underlying policy defines "bodily injury" as:

> bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom, including any intentional act by or at the direction of the insured which results in bodily injury, if such injury arises solely from the use of

> reasonable force for the purpose of protecting persons or property . . . .

Clearly, the "loss" suffered by the Luces' minor son as a result his sexual molestation by Vanderford was "bodily injury" as defined in LBI II and, by reference, in the National Catholic excess policy.

The underlying policy defines an "occurrence" as:

> an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . . .

Therefore, the issue is whether the Diocese's retention of Vanderford in March 1992 constituted an "occurrence" as defined by the policy.

The policy defines an "occurrence" as an "accident". The Oklahoma Supreme Court has considered the definition of an "accident" in the context of an insurance policy exclusion; the Court stated:

> the words, "accident" and "accidental" have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally. . . . by way of illustration, we quote from Webster's International Dictionary: Accident. An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event, chance, contingency. . . . It is an event from an unknown cause, or an unexpected event from a known cause. [citation omitted]. An unusual and unexpected result, attending the performance of a usual or necessary act. [citation omitted]. . . . an event which the actor did not intend to produce is produced by accidental means [citation omitted]. . . .

United States Fidelity & Guaranty Co. v. Briscoe, 239 P.2d 754, 756-57 (Okl. 1951).[1] The court in Briscoe emphasized that courts should construe the word, "accident", according to its plain meaning.[2]

Other courts interpreting the word, "accident", under Oklahoma law have followed the approach of the Briscoe court in relying upon the plain meaning of the word, "accident". See, e.g., Leggett v. Home Indemnity Co., 461 F.2d 257, 259-60 (10th Cir. 1972) (personal injury sustained by optometrist as a result of inhalation of fumes from dry cleaning plant which adjoined optometrist's office for five years was not the result of an "accident" as defined by dry cleaner's insurance policy); Massachusetts Bay Ins. Co. v. Gordon, 708 F. Supp. 1232, 1234 (W.D. Okla. 1989); see also Republic Nat'l Life Ins. v. Johnson, 317 P.2d 258, 261-62 (Okl. 1957).

In Gordon, the insured asserted that its insurer had a duty to pay a judgment rendered against the insured in a state court action for assault and battery. The insurer denied coverage on the

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[1] In Briscoe, bodily injuries, which sounded in nuisance, and resulted from a contractor's use of a cement loading mill were not covered under a contractor's insurance policy because, where cement dust escaped from the mill over a period of four months, the contractor received complaints, sought unsuccessfully to prevent further injuries, and persisted in conduct anyway, the injuries were not "caused by accident".

[2] The court further defined an "accident" by examining whether the event in question was expected or intended by the insured. See generally Willard v. Kelley, 803 P.2d 1124, 1128-29 (Okl. 1990) (approving the judicial approach of gauging the "accidental" character of an event from the insured's standpoint in the context of life and accident insurance). The policy definition at issue here also refers to bodily injury which was "neither expected nor intended from the standpoint of the insured".

grounds that an assault and battery was an intentional act and, as such, was not covered by the homeowner's policy in question. The policy language at issue in Gordon covered "bodily injury . . . caused by an occurrence . . . ." The policy further defined an "occurrence" as an "accident . . . ." The court examined the claim from the standpoint of the insured when it reasoned that the bodily injury was not caused by an "accident" or an "occurrence" because it "was the natural, reasonably foreseeable, and to-be-expected result of [the insured's] violent assault". Gordon, 708 F. Supp. at 1234; accord Smith v. Equitable Life Assurance Soc'y, 614 F.2d 720, 723 (10th Cir. 1980) (death is "accidental" for purposes of determining insurance coverage "if it w[as] neither reasonably foreseeable, nor the likely consequence of the [insured's] conduct"). The Gordon court agreed with the insurer that the assault and battery was not covered by the policy.

The policy language in Gordon replicates the language at issue in the instant case. Under the Gordon rationale, it is clear that, based on the language of the policy in this case, the Court must review the Diocese's expectation and intent to determine whether the Diocese's retention of Vanderford in 1992 qualifies as an "accident" or an "occurrence".

Courts in other jurisdictions have also used a plain meaning analysis when interpreting insurance policies which defined "occurrence" similarly to the policy here. In Silverball Amusement, Inc. v. Utah Home Fire Insurance. Co., the policy at issue contained a definition of "occurrence" with language similar

to the definition here: an "occurrence" is defined as an "accident, including continuous or repeated exposure to substantially the same general and harmful conditions." 842 F. Supp. 1151, 1157 (W.D. Ark.), aff'd, 33 F.3d 1476 (8th Cir. 1994) (per curiam). In the instant case, "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions which results in bodily injury . . . ." Based upon the policy definition of "occurrence", the Silverball Amusement court held that negligent hiring and supervision claims against an employer based on the intentional conduct of an employee who had sexually molested a child fell within the definition of an "occurrence".

In Town of Kimball v. Aetna Casualty & Surety Co., the Fourth Circuit interpreted an insurance policy clause which was similar to the definition at issue here to include a negligent supervision claim. 667 F.2d 439, 439-40 (4th Cir. 1981). The Kimball provision stated that:

> Aetna shall have a duty to defend against suits alleging accidents which [result] in bodily injury . . . neither expected nor intended from the standpoint of the insured.

Id. at 440. The operative provision here contains identical language: an "occurrence" is "an accident . . . which results in bodily injury . . . neither expected nor intended from the standpoint of the insured." See also, e.g., American States Ins. Co. v. Borbor, 826 F.2d 888, 894-95 (9th Cir. 1987) (vicarious liability for partner's child molestation is not an "intentional act" and is not excluded from policy coverage by California statute which provides that "an insurer is not liable for a loss caused by

the wilful act of the insured."); United States Fidelity & Guaranty Co. v. Open Sesame Child Care Ctr., 819 F. Supp. 756, 758-60 (N.D. Ill. 1993) (employer's alleged negligent hiring of employee who sexually molested child was an occurrence); Western World Ins. Co. v. Hartford Mut. Ins. Co., 600 F. Supp. 313, 318-21 (D. Md. 1984) (city's negligent hiring and supervision of police officer who shot claimant was an occurrence under general comprehensive liability policy).

These authorities inform this Court's interpretation of an "occurrence" under the policy provisions in the instant case. The Court finds that, based on the plain meaning of the language of the instant policy, the definition of an "occurrence" clearly was intended to encompass most claims for ordinary negligence. Therefore, the issue becomes whether the facts underlying the negligent retention claim here exclude "occurrence" coverage under the terms of the National Catholic excess policy. In other words, the Court must determine whether the facts in the stipulated record support a finding that the actions of the Diocese were more than ordinary negligence. As discussed below, in such a case the actions of the Diocese might not be covered under the general liability provisions of the policy.

It is undisputed that the Diocese received notice of Vanderford's alleged sexual misconduct in January 1992. Notwithstanding this notice, Vanderford was reinstated two months later. Although the Diocese had knowledge of Vanderford's prior misconduct when he was reinstated, the fact that the Diocese

possessed this knowledge does not necessarily ascribe to the Diocese the requisite expectation and intent to transform its retention of Vanderford from ordinary negligence into gross or willful negligence--which transformation might exclude the actions of the Diocese from "occurrence" coverage under the general liability section of the policy.

The Oklahoma Supreme Court explained in its landmark negligent retention case that:

> [w]hile "willfulness" and "malice" are implicit in harboring a vicious dog with propensity to bite, there is no rule which makes the master's negligence "willful" or "gross" because he should have anticipated the risk of injury from prior erratic behavior of his servant. Cases in which the master may have had reason to foresee the servant's injurious conduct from past events doubtless fall into a wide range of variety. We are not prepared to pronounce a per se rule for application to the entire class of litigation. We think the ultimate answer depends in each instance on whether prior knowledge makes the master's negligence "ordinary" or "gross".

Dayton Hudson Corp. v. American Mut. Liability Ins. Co., 621 P.2d 1155, 1161 (Okl. 1980). The Oklahoma statute defines "ordinary negligence" as the "want of ordinary care and diligence". Okla. Stat. tit. 25, § 6 (1987). "Gross negligence" is defined as the "want of slight care and diligence". Id. Under these statutory definitions:

> the employer's retention of an erratic or unfit servant does not appear to be more than "ordinary" negligence, while engaging a "vicious" person may, under some circumstances, constitute "reckless disregard of safety of others".

Dayton Hudson Corp., 621 P.2d at 1161 n.25; see also Tillman v. Christian (In re Initiative Petition No. 272), 388 P.2d 290, 293 (Okl. 1964) (prior knowledge of a fact alone, without proof of intentional fraud, willful misconduct, or guilty knowledge, is not

tantamount to willfulness of conduct); Wootan v. Shaw, 237 P.2d 442, 444 (Okl. 1951) (even proof of gross carelessness or negligence may not be sufficient to support award of punitive damages under statute requiring fraud, malice, or oppression; "The act which constitutes the cause of action must be actuated by, or accompanied with, some evil intent, or must be the result of such gross negligence, such disregard of another's rights, as is deemed equivalent to such intent."). Thus, as a matter of law, the Dayton Hudson court made clear that prior knowledge of an employee's bad acts does not necessarily convert an employer's negligent retention into willful or gross negligence.

In the instant case, there is no evidence in the record to support the conclusion that the Diocese intended to cause bodily injury to the Luces' minor son, or to anyone else, when it retained Vanderford or that the Diocese expected that such a result would occur. Thus, under Dayton Hudson Corp. and Tillman, the Diocese's prior knowledge of Vanderford's misconduct, without more, is not sufficient to transform the Diocese's retention of Vanderford into gross or willful negligence as a matter of law. It follows logically that "an act of negligence completely void of any intent to inflict injury or damage" may be construed as an "accident". See Penley v. Gulf Ins. Co., 414 P.2d 305, 308-09 (Okl. 1966) (property damage caused by insured's employee, who negligently

placed gasoline instead of diesel fuel in tank truck, was "caused by accident" and covered by insurance policy).[3]

Applying the above-cited authorities to the terms of the National Catholic excess policy, the Court concludes that the Diocese's negligent retention of Vanderford constitutes an "accident". This conclusion is based upon the plain meaning of the policy provision in question. There are no facts in the record evidencing willful conduct by the Diocese which might disturb this conclusion. Further, this conclusion is unaffected by the fact that the subsequent conduct of Vanderford, which conduct formed the basis of the claim against the Diocese for negligent retention, was intentional. See, e.g., Silverball Amusement, Inc., 842 F. Supp. at 1163-65 (court should not absolve distinction between intentional and negligent conduct, "allowing the intentional act to devour the negligent act for the purpose of determining coverage."). Therefore, the Court finds that the Diocese's negligent retention of Vanderford is an "occurrence" under the policy, and Defendant must indemnify Plaintiff unless there is a basis upon which to exclude coverage of the claim.

Defendant advances two bases in support of its argument that the provisions of the National Catholic excess policy operate to deny coverage for Plaintiff's claim. Defendant first argues that, under Burns, the following exclusion in the primary policy applies

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[3] Cf., e.g., Employers Surplus Lines v. Stone, 388 P.2d 295, 298 (Okl. 1963) (liability policy covered its insured, a partnership, for bodily injury resulting from assault and battery of one partner where other partner neither committed nor directed the assault).

to bar coverage in the instant case: "this policy does not apply to personal injury arising out of the willful violation of a penal statute or ordinance committed by or with knowledge or consent of any insured." (emphasis in original).[4]

In Burns, the Tenth Circuit applied an insurance policy exclusion for "personal injury arising out of the willful violation of a penal statute . . . committed by or with knowledge of [sic] consent of any insured" to preclude coverage of a negligence claim against a church's board of directors arising out of a volunteer bus driver's sexual molestation of two girls. 971 F.2d at 442-43. The Burns court considered whether the allegations of negligence involving defendants' failure to discharge Burns after they became aware of his behavior were alone controlling. Id. at 442. In light of the broad language of the penal statute exclusion, the court predicted that "the Oklahoma court would likewise view the damage suit petitions as a whole, including the element of the molestations and resulting injuries, which bring into play the penal act exception." Id. at 444.[5]

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[4] Under the terms of the excess policy, the claim must be covered under the primary policy before the excess policy provides coverage.

[5] The Burns court distinguished the Dayton Hudson Corp. opinion on the ground that that opinion did not involve a penal statute exclusion but rather "dealt with the question of whether an employer's own negligence in not discharging an unfit servant is a case in which insurance coverage should not be permitted to protect against the employer's liability for punitive damages." 971 F.2d at 445.

Defendant's reliance upon the Burns decision is misplaced. Unlike in Burns, under the primary policy in this case, "personal injury" is defined as:

> injury which arises out of one or more of the following offenses committed in the conduct of the named insured's business:
>
> (a) false arrest, detention or imprisonment, or malicious prosecution;
>
> (b) the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy; except publications or utterances in the course of or related to advertising, broadcasting or telecasting activities conducted by or on behalf of the named insured;
>
> (c) wrongful entry or eviction, or other invasion of the right of private occupancy . . . .

After examining the policy definition for "personal injury", it is clear that the injury at issue here is "bodily injury" as defined in the policy--and not "personal injury". There is simply no harm complained of that would fall within the category of "personal injury" as defined in the LBI II primary policy. Therefore, the Burns holding is inapplicable to the instant case, and the above-cited penal statute exclusion does not apply to bar coverage of Plaintiff's claim. Accord Silverball Amusement, 842 F. Supp. at 1158 (distinguishing Burns in part because the exclusion in that case differed from the exclusion in the Silverball Amusement policy).

Second, Defendant argues that endorsement five of the National Catholic excess policy, entitled "Sexual Misconduct Limited Coverage", is the proper provision in the policy applicable to claims of sexual misconduct and, further, that Plaintiff should be

denied coverage under the terms of this endorsement. The Court concludes, however, that endorsement five does not preempt coverage of Plaintiff's claim under the general liability provisions of the policy.

The general liability provisions and endorsement five offer separate coverages for distinct types of claims. Plaintiff's claims here are not affected by the terms of endorsement five. First, there are no provisions in either policy which support the view that the terms of endorsement five control any and all claims involving sexual misconduct. Second, Defendant has not identified any authority in support of the view that the general liability provisions are preempted by endorsement five. Finally, as stated above, Plaintiff's claim in this case is based upon the negligent retention of Vanderford by the Diocese, the insured. Thus, the provisions of endorsement five do not apply to Plaintiff's claim.

In conclusion, the Court grants Plaintiff's motion for summary judgment and holds that LBI has a legal right to indemnification from National Catholic for the settlement amount and attorneys' fees and expenses incurred above the primary policy limits.

IT IS SO ORDERED.

This 14TH day of AUGUST, 1995.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 11 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RENALDO WASHINGTON,

Plaintiff,

vs.

MARTIN HART, et al.,

Defendants.

No. 93-C-1027-E

ENTERED ON DOCKET
DATE AUG 14 1995

ORDER

IT IS HEREBY ORDERED that Defendant Martin Hart shall file a dispositive motion on or before sixty (60) days from the date of entry of this order.

SO ORDERED THIS 11th day of August, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

(10)

8-9-95

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROL S. BREWER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-C-563-C
	)	
MEMOREX TELEX CORPORATION,	)	Tulsa County District Court
a Delaware corporation,	)	Case No. CJ-95-02354
	)	
Defendant,	)	

ORDER

Now on this 8th day of August, 1995, the above-entitled cause comes on before the Honorable Judge H. Dale Cook of the United States District Court For The Northern District Of Oklahoma, upon the Plaintiff's Application to Remand Action to the District Court In And For Tulsa County, State Of Oklahoma. The Plaintiff, Carol Brewer, appears by and through her attorney, Fred V. Monachello. The Defendant, Memorex Telex Corporation, appears by and through their attorneys, Larry D. Henry and Patrick W. Cipolla.

The Court, having heard and considered the arguments of counsel and being fully advised, finds that the captioned action should be remanded to the District Court in and for Tulsa County, State of Oklahoma, Case No. CJ-95-02354.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case be and the same is hereby remanded to the District Court in and for Tulsa County, State of Oklahoma, as Case No. CJ-95-02354.

H. Dale Cook

Honorable H. Dale Cook
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM G. BROWN and JUDY BROWN,	)	
Plaintiffs,	)	
vs.	)	**NO. 95-C-272 K**
FRED C. VANARSDALE, JEFF CURTZ, TOMMY OSBORN, JR., and NATIONAL AMERICAN INSURANCE COMPANY,	)	
Defendants.	)	

ORDER DISMISSING PROPERTY
DAMAGE CLAIM WITH PREJUDICE

ON THIS 11 day of ~~July~~ August, 1995 came on for hearing the Motion For Dismissal With Prejudice Of Property Damage Claim Only filed by the Plaintiffs, William G. Brown and Judy Brown. The Court finds good cause has been shown for dismissing the property damage claims alleged by William G. Brown and Judy Brown with prejudice against refiling of the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the property damage claims asserted by William G. Brown and Judy Brown are dismissed with prejudice against refiling of those claims.

IT IS SO ORDERED.

JUDGE OF THE DISTRICT COURT

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ENTERED ON DOCKET
DATE AUG 14 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 11 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HELEN GREY TRIPPET; HELEN GREY TRIPPET, Custodian for Leslie S. Murphy and Mark Murphy; ROBERT S. TRIPPET, Guardian of Virginia Trippet; MARY SUSAN TRIPPET; CONSTANCE S. TRIPPET; FLO HEDLEY NORVELL and RUSSEL SIMPSON NORVELL, Executors of the Estate of Alberta Simpson Matteson; HELEN GREY TRIPPET, Custodian for Scott Trippet Poland,

Plaintiffs,

vs.

TRI-TEXAS, INC. (a Florida Corporation); CHARLES S. CHRISTOPHER; THE HOME-STAKE OIL AND GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION; JARRELL B. ORMAND; PAINE WEBBER INCORPORATED,

Defendants.

No. 92-C-192-E

O R D E R

Now before the Court is the Motion for Attorney Fees (Docket #227) of the Plaintiffs Helen Grey Trippet, Robert S. Trippet, Mary Susan Trippet, Constance S. Trippet, Flo Hedley Norvell, and Russel Simpson Norvell.

On December 12, 1994, after a non-jury trial, the court entered judgment in favor of plaintiffs and against defendants on plaintiffs' rescission claims; in favor of Helen Grey Trippet and against Tri Texas, Inc. and Charles S. Christopher on her claims on the promissory note and guaranty obligations; and in favor of Helen Grey Trippet and against Tri Texas and Charles S. Christopher on her claim for surety related to the promissory note.

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Plaintiffs then filed a motion for attorneys' fees, claiming that this action was based on rescission of contract wherein the contracts contained a provision for the award of attorneys' fees to the prevailing party. The contract language on which plaintiffs' rely is as follows:

> If any action at law or in equity, including an action for declaratory relief, is brought to enforce or interpret the provisions of the Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party, which fees may be set by the court in the trial of such action or may be enforced in a separate action brought for that purpose, and which fees shall be an addition to any other relief which may be awarded.

Defendants argue that the contracts do not provide a basis for an award of attorneys' fees, because once the contracts were rescinded, they became null and void. The Court is convinced that this language does not authorize fees in a situation where the claim was for rescission. See Stitt v. Willimas, 919 F.2d 516 (9th Cir. 1990)(attorneys' fees not appropriate under similar contract provision because the action was not to enforce contract, but rather to collect damages for fraud or to rescind contract).

Plaintiffs also urge that attorneys' fees are appropriate under Okla.Stat.tit.12, §936, because they prevailed on their note and guaranty claim. Section 936 states:

> In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to the action, the prevailing party shall be allowed a reasonable attorney fee to by set by the court, to be taxed and collected as costs.

However, in Rendezvous Trails of America, Inc. v. Ayers, 612 P.2d

1384 (Okla. App. 1980), the court noted that §936 was not applicable to contracts relating to the sale of stock. In this case, the promissory note related to the sale of stock and §936 is therefore inapplicable.

Plaintiffs' motion for attorney fees is denied.

So ORDERED this 11th day of August, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 11 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

OLD REPUBLIC MINNEHOMA INSURANCE COMPANY,

Plaintiff,

v.

TRIAD WARRANTY CORPORATION AND HAMBURG BROTHERS CORPORATION,

Defendants.

CIVIL ACTION

NO. 95-C-451C

ENTERED ON DOCKET

DATE 8-14-95

ORDER OF COURT

AND NOW, this 11th day of August, 1995, upon motion of Hamburg Brothers Corporation to Dismiss the above-captioned Complaint for Declaratory Judgment against it, and after notice to all parties and hearing before this Court on August 8, 1995 at which counsel for Old Republic Minnehoma Insurance Company and Hamburg Brothers Corporation were present and were heard, and

BASED upon the uncontroverted facts in the affidavits and memoranda of law and the acknowledgment of the parties that Hamburg Brothers Corporation has filed no claims for coverage of losses under warranty contracts with Old Republic Minnehoma Insurance Company to date and it is uncertain whether it shall have or assert any claims qualified for coverage in the future, and upon the grounds stated by the Court on the record at the hearing on August 8, 1995, it appears that no actual case or controversy exists at this time between Old Republic Minnehoma Insurance Company and Hamburg Brothers Corporation sufficient to

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create subject matter jurisdiction of this action under the Declaratory Judgment Act, 28 U.S.C. § 2201, and

FOR THIS REASON, it is the opinion of the Court that any decision it would be asked to render on the case would be only speculative and advisory, it is therefore

ORDERED Hamburg Brothers Corporation's Motion to Dismiss is SUSTAINED and that the Complaint is DISMISSED as to Hamburg Brothers Corporation for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Having dismissed the Complaint as to Hamburg Brothers Corporation for lack of actual case or controversy, this Court does not render an opinion on the other grounds asserted in Hamburg Brothers Corporation's Motion to Dismiss based on lack of personal jurisdiction or improper venue.

H. DALE COOK,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRIDON COMPOSITES,INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 94-C-1157-B
OSPREY, INC. d/b/a TALON,INC. and DONALD MOOK,	)	
Defendants.	)	

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Tridon Composites, Inc. and the Defendant, Osprey, Inc. d/b/a Talon, Inc., through their counsel, pursuant to Fed.R.Civ.P. 41 (a) (1) (ii), and stipulate that Plaintiff's action against the Defendant, Osprey, Inc., d/b/a Talon, Inc. may be and it is hereby dismissed without prejudice with each party to bear their respective costs and attorney fees. This dismissal does not apply to the Plaintiff's claims against Defendant, Donald Mook, who has not entered an appearance herein.

Dated this 10th day of August, 1995.

Patrick O'Connor, OBA #6743
MOYERS, MARTIN, SANTEE,
IMEL & TETRICK
320 South Boston, Suite 920
Tulsa, OK 74103
(918) 582-5281

ATTORNEYS FOR PLAINTIFF
Tridon Composites, Inc.

Lawrence R. Watson, OBA #010148
DOUGHERTY, HESSIN, BEAVERS & GILBERT
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One West Third Street
Tulsa, OK 74103
(918) 592-6970

ATTORNEYS FOR DEFENDANT
Osprey, Inc. d/b/a Talon, Inc.

CERTIFICATE OF SERVICE

This is to certify that on this 10th day of August, 1995, a true and correct copy of the foregoing STIPULATION OF DISMISSAL was mailed by first class, postage-prepaid mail to:

Patrick J. O'Connor, Esq.
MOYERS, MARTIN, SANTEE, IMEL & TETRICK
320 S. Boston Building, Suite 920
Tulsa, OK 74103

Lawrence R. Watson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY NELSON DUNCAN, Ph.D.,)
)
Plaintiff,)
)
v.) No. 94-C-955-B
)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY,)
)
Defendant.)

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 10 day of Aug., 1995, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ THOMAS R. BRETT

United States District Judge

416\15\stip.dlb\PTB

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
)
LEE OWENS aka CLIFFORD LEE)
OWENS; UNKNOWN SPOUSE, IF ANY)
OF LEE OWENS aka CLIFFORD LEE)
OWENS; STATE OF OKLAHOMA ex rel)
OKLAHOMA TAX COMMISSION;)
COUNTY TREASURER, Tulsa County,) Civil Case No. 95-C 80K
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,
Defendants.

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Defendant, UNKNOWN SPOUSE IF ANY OF LEE OWENS aka CLIFFORD LEE OWENS, is hereby dismissed from this action.

Dated this 8 day of Aug, 1995.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONSOLIDATED FUEL CORPORATION, a Delaware corporation, and SUNRISE ENERGY SERVICES, INC., a Delaware corporation,

Plaintiffs,

vs.

THOMAS S. LAWRENCE,

Defendant.

Case No. 93-C-802-K

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Consolidated Fuel Corporation ("Consolidated"), and the Defendant, Thomas S. Lawrence, through their counsel, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and stipulate that all claims for relief asserted by Consolidated may be and are hereby dismissed with prejudice, with each party to bear their respective costs and attorney fees.

DATED this 9th day of August, 1995.

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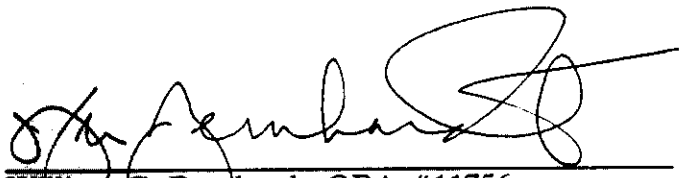
ATTORNEYS FOR DEFENDANT,
THOMAS S. LAWRENCE



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